TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 330.

THE KENNEBEC AND PORTLAND RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

THE PORTLAND AND KENNEBEC RAILROAD CO., JOHN PATTEN, SURVIVING TRUSTEE, R. D. RICE, ET AL.

IN ERROR TO THE SUPREME JUDICIAL COURT OF THE STATE OF MAINE.

FILED FEBRUARY 26, 1872.

or that there was something [illegible] slavery contract, making this

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c THE UNITED STATES OF AMERICA, *ss:*

[SEAL.] The President of the United States of America to the judges of the supreme judicial court of the State of Maine, greeting:

Whereas in a certain suit in said supreme judicial court, between The Kennebec and Portland Railroad Company, plaintiff, and The Portland and Kennebec Railroad Company, John Patten, surviving trustee, & others, defendants, which suit was removed to the Supreme Court of the United States by virtue of a writ of error agreeably to the act of Congress in such case made and provided, certain inaccuracies, defects, and omissions in the record of the proceedings have been suggested:

You therefore are hereby commanded that, searching the record and proceedings in said cause, you certify, forthwith, to the said Su-
b preme Court, under your seal, a full, true, & complete transcript of said record and proceedings, plainly and distinctly, and in as full and *and* ample a manner as the same now remain before you, together with this writ, so that the said Supreme Court of the United States may be able thereon to proceed, and do what shall appear to them of right ought to be done. Herein fail not.

Witness the Honorable Salmon P. Chase, Chief Justice of the said Supreme Court, the first Monday of December, A. D. 1871.

D. W. MIDDLETON,
Clerk Supreme Court, U S.

Issued 27th January, 1872.

(Endorsed:) No. 330. Sup. Court, U. S. December term, 1871. Kennebec & Portland Railroad Company, plaintiff in error, vs. The Portland & Kennebec R. R. Co., et al. Certiorari. Kennebec, ss. Clerk's office, sup. jud. court. Received January 31st, 1872. Attest: W'm M. Stratton, clerk.

c STATE OF MAINE:

In obedience to the writ of certiorari, hereto annexed, the judges of the supreme judicial court of the State of Maine, have searched and proceedings in the case named therein, (The Kennebec and Portland Railroad Company, plaintiffs in equity, vs. The Portland and Kennebec Railroad Company, and John Patten, surviving trustee, and others, defendants,) remaining in the clerk's office of said supreme judicial court, in the county of Kennebec, and herewith return said writ to the Supreme Court of the United States, together with a full, true, and complete transcript of the record and proceedings in said suit, in as full and ample a manner as the same are now remaining as aforesaid; said transcript being contained in the printed pages hereto annexed, numbered one to one hundred nine, (1 to 109,) inclusive, duly cer-
d tified by the clerk of this court.

In testimony whereof we have caused our seal to be hereto affixed, and the name of our said clerk to be hereto subscribed, at Augusta, this 22d day of February, A. D. 1872.

[SEAL.] W'M M. STRATTON, *Clerk.*

1 STATE OF MAINE, *Kennebec, ss:*

At the supreme judicial court begun and holden at Augusta, within and for the county of Kennebec, on the third Tuesday of October, being

the 18th day of said month, anno Domini 1870, by the Hon. Charles W. Walton, a justice of said court.

[U. S. I. R. stamp, 50 c.]

THE KENNEBEC & PORTLAND RAILROAD COMPANY, plaintiffs in equity,
vs.
THE PORTLAND & KENNEBEC RAILROAD COMPANY and others, defendants.
} No. 40.

The bill.

To the honorable the justices of our supreme judicial court next to be holden at Augusta, in the county of Kennebec:

The Kennebec and Portland Railroad Company, a corporation organized under the laws of this State, bring this bill of complaint against The Portland and Kennebec Railroad Company, a corporation organized under the laws of said State, and having its office and principal place of business at said Augusta; Richard D. Rice and Darius Alden of said Augusta; Nathaniel M. Whitmore, of said Gardiner; Sarah Hagar, of Richmond, in said county of Sagadahoc, administratrix on the goods and estate of Marshal S. Hagar, late of said Richmond, de-
2 ceased; George F. Patten, John Patten, and William D. Sewall, of said Bath; Joseph McKeen, of Brunswick, in the county of Cumberland; George F. Shepley, John B. Brown, and Horatio N. Jose, all of Portland, in said county of Cumberland, and thereupon show unto your honors that, heretofore, to wit, in the year 1850, there existed in this State, and under the authority of the legislature thereof, a corporation known as The Kennebec and Portland Railroad Company, holding and owning a railroad running and extending from said Augusta, through the towns of Brunswick and Yarmouth to the city of Portland, and thence to a junction with the Portland, Saco and Portsmouth Railroad, at Cape Elizabeth, with a branch road extending from said Brunswick to said Bath. And your orators show that, in the construction of that portion of said railroad extending from said Augusta to said Yarmouth, including the said branch from Brunswick to said Bath, said corporation issued certificates of stock, known as original stock, to the amount of seven hundred thousand dollars or thereabouts, and issued and sold certificates of stock, known as old preferred stock, to the amount of two hundred and forty thousand dollars or thereabouts, on which certificates last named dividends of ten per cent. per annum were payable to the holders thereof.

And your orators show that, in order to obtain money and means with which to construct that portion of said railroad extending from Yarmouth to the city of Portland, and thence to the junction of the same with the said Portland, Saco and Portsmouth Railroad, at Cape Elizabeth, said corporation agreed with certain persons to your orators unknown, that if they would furnish money or means to said corporation with which to construct said portion of said railroad, exclusive of
land damages, depots, and furniture, said corporation would
3 threupon issue to such persons certificates of stock known as Yarmouth stock, and secure to the holders thereof the whole income and receipts from that portion of said railroad until said contributors were paid the full sums advanced by them, and ten per cent. annual income; and if at any time such income and receipts were insufficient to pay said ten per cent. then that corporation would advance

and pay to said contributors, or to trustees for them, such sum as would make up ten per cent. and secure to said contributors said payments by a first mortgage of said portion of said railroad and franchise to them or to trustees for them, to be held until the amount so advanced, with ten per cent. annual income was fully paid, said portion then to become the property of said corporation; and your orators aver that said corporation issued to said contributors certificates of stock to the amount of two hundred and four thousand two hundred dollars, on which dividends of ten per cent. were payable, and duly secured the same by mortgage to one Reuel Williams, John Patten, and J. B. Carroll, in trust, and that said Williams, Patten, and Carroll duly accepted said trust. And your orators show that, in order to obtain money or means with which to construct and equip said railroad, the said corporation—due authority having been granted therefor by the legislature of this State—borrowed of certain cities and towns on the line of said railroad, and of certain persons to your orators unknown, the sum of eight hundred thousand dollars in money and scrip; and, as security and indemnity to said cities, towns, and others against loss by reason thereof, said corporation duly executed a mortgage of nineteen-twentieths of said railroad and franchise, to commissioners of the sinking fund provided by the act authorizing said loan, and another mortgage of one-twentieth of said railroad and franchise to one
4 John Patten, Marshal S. Hagar, and Joseph McKeen, in trust, subject, however, to the mortgage given to said Williams, Patten, and Carroll; that, afterwards, in the year 1851, said corporation duly issued and sold bonds known as first-mortgage bonds of the Kennebec and Portland Railroad Company, to the amount of two hundred and thirty thousand dollars, payable ten years from date, with interest payable semi-annually, according to the tenor of the coupons or interest-warrants thereto attached, and duly secured the same by a mortgage of said railroad and franchise to said Patten, Hagar, and McKeen, in trust, subject, however, to the mortgages before named; that, afterwards, in the year 1852, said corporation duly issued, and sold in part bonds known as the second-mortgage bonds of said Kennebec and Portland Railroad Company to the amount of two hundred and fifty thousand dollars, payable in twelve years from date, with semi-annual interest, according to the tenor of coupons or interest-warrants thereto annexed, and duly secured the same by a mortgage of said railroad and franchise to said Patten, Hagar, and McKeen, in trust, subject, however, to the other mortgages hereinbefore named; and that, afterwards, in the year 1854, said corporation duly issued and sold certificates of stock known as new preferred stock, to the amount of one hundred and twenty thousand dollars or thereabouts, on which certificates semi-annual dividends of three per cent. were and are payable, making the entire cost of said railroad when completed and equipped, two million five hundred and forty-four thousand two hundred dollars or thereabouts; and your orators aver that said Patten, Hagar, and McKeen duly accepted their said trusts; and that, in the year 1853, agreeably to a vote of said corporation, said certificates of old preferred stock were surrendered to said corporation, and new certificates, on which semi-annual divi-
5 dends of three per cent. were payable, were issued to, and received by, the holders thereof; and the holders of the Yarmouth stock relinquished, for the benefit of the holders of said old preferred stock, four of the ten per cent. payable to them as aforesaid.

And your orators show that, afterwards, in the year 1857, said Patten, Hagar, and McKeen, trustees as aforesaid, the interest on first and

second mortgage bonds not having been paid by said corporation, in behalf of said bondholders, and by reason of the breach of the condition of said mortgages given to secure said bonds, duly took the possession and management of said railroad, franchise, and the furniture thereof, and so continued the possession and management of the same up to the year 1864, or thereabouts, taking all the income, rents, and profits.

And your orators further show that, in the year 1861, one Allen Lambard, Thomas J. Southard, and Abner B. Thompson, and said Darius Alden, Nathaniel M. Whitmore, George F. Patten, and William D. Sewall, were duly elected directors of said Kennebec and Portland Railroad Company, and so continued until December, 1864; and that the said Allen Lambard was duly chosen president of said corporation, and that said president and directors duly accepted said trusts; and your orators aver that it became and was the duty of said president and directors, imposed upon them as well by the charter, by-laws, and votes of said corporation as by the laws of the land, to do all things necessary and proper to be done for the faithful and efficient administration of the business and affairs of said corporation, and that the said trustees, in assuming the direction and management of said railroad, as aforesaid, were and of right ought to be holden to account to your orators, The Kennebec & Portland R. R. Co., not only for the income and the profits actually received by them, but for what might have been received, if said railroad had been properly and efficiently managed by them;
6 and your orators aver that said trustees so carelessly, negligently, and unskilfully managed said railroad and its affairs, while in the possession thereof, that the net earnings and income received by them were much less, to wit, in the sum of two hundred thousand dollars per annum than they should have been and would have been, if the same had been faithfully and properly managed by said trustees, and in accordance with the spirit and fair intents of their said trusts.

And your orators aver that the said McKeen, Patten, and Hagar, while acting as trustees as aforesaid, and being in the possession and management of said railroad, combining with said Alden, Whitmore, Sewall, and George F. Patten, while directors of said Kennebec and Portland Railroad Company, and a majority thereof, and with one R. D. Rice, John B. Brown, George F. Shepley, and Horatio N. Jose, and with other persons to your orators unknown, all of whom, when discovered, your orators pray may be made parties defendant to this bill, contriving and intending to obtain for themselves and their associates the possession, management, and ownership of said railroad franchise and rolling stock, and to deprive your orators, the Kennebec and Portland Railroad Company thereof, and of all hope of profit therefrom, for that purpose bought in a large amount of said original preferred and Yarmouth stock, bonds, coupons, mortgages, and other claims, all of which your orators, the Kennebec and Portland Railroad Company, were liable to pay and redeem; said purchases in all amounting to seven hundred thousand dollars, or thereabouts, as your orators are informed and believe, for much less than the real value thereof, all of which stock, bonds, coupons, mortgages, and claims, your orators are informed and believe, were so purchased with money belonging to said company, being the earnings of said railroad, and by the said McKeen, Patten,
7 and Hagar, trustees as aforesaid, and while in the possession and management of said railroad as aforesaid, and by the said Alden, Whitmore, Sewall, and George F. Patten, while directors of said railroad as aforesaid, and by the said Rice, Brown, Shepley, and Jose, in con-

nection with said trustees and directors, well knowing them to be such, and the purposes for which said purchases were made.

And your orators aver that Reuel Williams, late of said Augusta, deceased, was in his lifetime the owner of original, preferred, and Yarmouth stock, bonds, coupons, and claims, secured by a mortgage of the rolling-stock of said railroad, to the amount of five hundred thousand dollars, or thereabouts, and being so the owner, in the year 1861, offered to sell and dispose of the same to the said McKeen, Patten, and Hagar, trustees as aforesaid, for the benefit of your orators, The Kennebec and Portland Railroad Company, for the sum of one hundred and thirteen thousand dollars or thereabouts, and for much less than the real value thereof, but the said trustees contriving and intending to obtain for themselves and their associates the ownership of said railroad, declined to accept said offer and make said purchase, which, in the proper exercise of their said trusts they should have made; that, afterwards, the said stock, bonds, coupons, and claims secured as aforesaid, were purchased of the said Williams by the said Rice and Alden, for the benefit of the said trustees and their said associates, and for the purposes aforesaid, for the said sum of one hundred and thirteen thousand dollars or thereabouts, which sum was so paid to the said Williams out of the earnings, income, and profits of the said Kennebec and Portland Railroad Company; but the said defendants, instead of surrendering said stock, bonds, coupons, and claims to your orators, The Kennebec and Portland Railroad Company, as in justice and good conscience they ought to do, claim to hold the same against and to recover the
8 same in full of your orators, The Kennebec and Portland Railroad Company.

And your orators aver that the said Alden, Whitmore, Sewall, and George F. Patten, being directors as aforesaid, and a majority of said board, combining with said McKeen, Patten, and Hagar, trustees as aforesaid, and with their associates before named, and for the purpose of becoming the owners of said railroad as aforesaid, in violation of their trusts, neglected to pay the interest upon and redeem said bonds; and, in the year 1863, your orators, through said Allen Lambard, their president, having brought in this honorable court a bill in equity for the purpose of redeeming the mortgages given to secure the said bonds, the said Alden, Whitmore, Sewall, and Patten, without the knowledge of the said Lombard, president as aforesaid, and for the purposes aforesaid, called and held a meeting of said board of directors and voted to dismiss said bill in equity from this court, and the same was accordingly dismissed, as will appear by the records now remaining in said court.

And your orators aver that, from the time when the said trustees became possessed of said railroad and franchise, hitherto the same has been of great value, and sufficient, if administered according to the true tenor and effect of the trusts and of the equitable liens with which the same was charged by your orators, The Kennebec and Portland Railroad Company, to have paid the interest upon said bonds, and to have redeemed said bonds, and should have been so applied; but the said trustees and directors not regarding their said trusts, used and applied the same to purchase stock, bonds, coupons, and claims for the benefit of themselves and their said associates, and allowed the interest on said bonds to go unpaid, and said bonds and mortgages to be and remain unredeemed.

And your orators aver that, at some time subsequent to 1863,
9 but at what precise time your orators are not informed, but pray that the said defendants may discover and set forth at what

time, the said defendants, The Portland and Kennebec Railroad Company were, as they claim, created a body corporate and became possessed of said railroad property and franchise, claiming to hold the same, as your orators are informed and believe, by some title derived by or through and under the mortgage given to secure the first and second mortgage bonds, and as holders of said bonds made and issued as aforesaid by the said Kennebec and Portland Railroad Company, and they pray that the said defendants may set forth fully and specifically by what right and title they claim to hold said railroad and franchise, if any, and have appropriated the same to their own use and have ever since taken and received the rents, profits, and income thereof, and have appropriated the same to their own use, and have not paid or offered to pay the dividends on said preferred stock, nor the interest on said first-mortgage bonds, nor made provision for the payment of the principal of said bonds.

Nevertheless your orators aver that the said defendants, The Portland and Kennebec Railroad Company, if they hold any legal and valid title to said property, railroad, and franchise, which your orators do not admit, took the same with notice of the trusts which had been created by and by force of the agreements and undertakings of the said Kennebec and Portland Railroad Company, and of the equitable rights of the holders of said bonds and of said old and new preferred stock created thereby, to demand and enforce payment of their interest and dividends, and of the principal of said bonds upon the same becoming due and payable, out of the income of said property, according to the tenor and effect of said agreements and undertakings. And
10 your orators aver that the said trustees and directors and their said associates, became and were members of said defendant corporation and composed the same. And your orators aver that the money paid for said stock and bonds was used in the construction and equipment of said railroad, and that no dividends have been paid on said stock, or interest on said bonds since the first day of April, 1856.

And your orators aver that, in the year 1862, said Marshal S. Hagar deceased, and the said Sarah Hagar, having been duly nominated and appointed administratrix on the goods and estate of the said Marshal S., duly accepted said trusts. And your orators aver that, in the year 1862, or thereabouts, and again in the month of August, 1865, they duly demanded of the said trustees and of the defendants, The Portland and Kennebec Railroad Company, a true account in writing of the amount due on the mortgages given to secure said first and second mortgage bonds, and of the rents, income, and profits, and money expended in repairs and improvements of said mortgaged premises, in order that they might pay the amount equitably due thereon as the same shall be found by this honorable court, if anything, and that the said trustees and the defendants, The Portland and Kennebec Railroad Company, have unreasonably neglected and refused to render such account or to allow your orators, The Kennebec and Portland Railroad Company, to redeem said mortgages, although your orators aver that they duly tendered to said trustees and bondholders the amount due upon said bonds and coupons on the day of , A. D. 1865, where the same were payable. Forasmuch, therefore, as your orators are entirely remediless in the premises, according to the strict rules of the common law, and can only have relief in a court of equity where matters of this nature are properly cognizable and relievable—to the end, therefore, that the said Portland and Kennebec Railroad Company may,
11 if they can, show why your orators should not have the relief

hereby prayed, and may, under its corporate seal, if any, full, true, direct, and perfect answer make to all and singular the matters hereinbefore set forth and charged, and that the said George F. and John Patten, and that the said Whitmore and Sarah Hagar may answer specifically whether or not, the said John Patten and Marshal S. Hagar, while trustees as aforesaid, were in any way, either directly or indirectly, interested in any purchases of stock, bonds, mortgages, coupons, or claims, issued by said Kennebec and Portland Railroad Company, which said company was liable to pay or redeem, and whether there was any agreement or understanding between the said John Patten and Marshal S. Hagar, and the said Rice, that they, the said Patten and Hagar were, or were to be in any way, interested in the purchase made by said Rice, of said Reuel Williams, and whether they, the said Patten and Hagar, or any person or persons for them, have received any stock, coupons, or bonds so purchased of said Williams by said Rice; if so, when, and what amount, and what was paid therefor, if anything, and that the said Rice and Alden may answer specifically whether the said Williams purchase, or any negotiation therefor was made at the request, suggestion, or with the knowledge of the said John Patten, Marshal S. Hagar, or Joseph McKeen, trustees as aforesaid, or either of them, or by the direction of or in behalf of the holders of said bonds, and whether, to their knowledge, information, or be*half* the said John Patten and Marshal S. Hagar, or either of them, were, directly or indirectly, interested in said Williams purchase, what amount of original, new and old preferred stock, Yarmouth stock, first and second mortgage bonds, coupons, and claims secured by mortgages on the rolling-stock of said railroad, were purchased by them,
12 or either of them, of the said Williams, and what disposition was made of the same by them or either of them, and whether they or either of them delivered or agreed to deliver any portion of said purchase, and if so, what portion, to the said John Patten, or to any one for him, to the said Marshal S. Hagar, or to any one else in his behalf, to the said Whitmore, Sewell and George F. Patten, and to the said Shepley, Brown, and Jose, and how much to each and what was paid therefor, if anything; and that the said Joseph McKeen may answer specifically whether, to his knowledge, information, or be*half*, the said Williams purchase was made at the request, suggestion, or with the knowledge of said trustees, or either of them, or by the direction of or in behalf of the holders of said bonds; and that the said John Patten, Sarah Hagar, Joseph McKeen, Darius Alden, N. M. Whitmore, William D. Sewall, George F. Patten, R. D. Rice, George F. Shepley, John B. Brown, and Horatio N. Jose, may answer specifically what amount of stock, bonds, coupons, and claims which your orators, The Kennebec and Portland Railroad Company, were liable to pay, they and each of them have purchased or received, when, of whom, and at what prices, and that the defendants, The Portland and Kennebec Railroad Company may state the amount of income received by them since they came into the possession and management of said railroad, and that they and the said trustees may be decreed to come to a fair and just account with the plaintiffs, The Kennebec and Portland Railroad Company, in respect to the net income of the said mortgaged premises, and may be enjoined from using or appropriating the income of said railroad property and franchise otherwise than in accordance with and fulfilment of the trusts and equitable liens charged upon the same by the Kennebec and Portland Railroad Company, as they shall be
13 found by this honorable court; and that the plaintiffs may be

let in to redeem the said mortgaged premises on payment to the defendants of what shall appear to be due to them, if anything, after deducting thereout what the said trustees and the said Portland and Kennebec Railroad Company have received, or might have received from the rents, profits, and income of said mortgaged premises, and that the said defendants may be decreed to pay unto and account with the plaintiffs, The Kennebec and Portland Railroad Company, for what shall appear to be due upon taking the said account, and deliver possession of the said mortgaged premises to the plaintiffs, The Kennebec and Portland Railroad Company, together with the furniture and rolling-stock of said railroad, and the books, writings, and records relating thereto, and that the said plaintiffs may have such further and other relief as the nature of this case requires, and to your honors shall seem meet: May it please your honors to grant unto your orators a writ of subpœna to be directed to said defendants commanding them to appear before your honors, in this honorable court to answer as above prayed, and to stand, perform, and abide such orders and decrees as your honors shall make in this cause, and such final decree as to your honors shall seem meet. And your orators will ever pray.

W'M M. REED,
Pres. K. & P. R. R. Co.

A. G. STINCHFIELD,
Solicitor to Plaintiffs.

Sworn to October 24th, 1865.

This bill was entered in this court at the November term in this county, anno Domini 1865, when and where the defendants entered their appearance thereto by Messrs. Bradbury, Whitmore and Libbey, their attorneys. At which term, likewise, the time to file answers,
14 was extended to February 15, 1866, and the plaintiffs had leave to amend by adding the name of R. D. Rice on pages five six, and ten of the printed bill. Also the death of Joseph McKeen, one of the defendants, was suggested.

On January 17th, 1866, the defendants filed their several demurrers to the bill. February 20th, 1866, the plaintiffs file a rule on defendants to show cause, &c. March 7th, 1866, the plaintiffs file joinders in demurrer, and thereupon the case was marked "Law," and continued from term to term, to the November term, 1866, when and where an order was received from the law court (received January 8th, 1867,) to enter in said case, "demurrers sustained." Thence the case was continued from term to term to the August term, 1867, when and where the court allowed the plaintiffs to amend their bill on terms, which terms were to be prescribed by Judge Danforth at the then next term. And the bill was amended accordingly, as it appears of record above. Answers of the defendants ordered to be filed in sixty days. Thence the case was continued to the October term, 1867, when and where the following terms were imposed by Judge Danforth, to wit: Plaintiffs to pay costs as the condition of their amendments; time to file answers extended to November 15th, 1867. Thereupon the plaintiffs alleged exceptions to the said adjudication of the judge, and the same were duly allowed and signed by said judge. October 14th, 1867, the answer of John Patten, trustee, was filed. November 14th, 1867, the answer of The Portland and Kennebec Railroad Company, of R. D. Rice and of Sarah Hager, administratrix, were filed. November 15th, 1867, George F. Patten, William D. Sewall, Darius Alden, and Nathaniel M. Whitmore filed

their several answers. November 25th, 1867, John Patten filed an amended answer. November 27th, 1867, defendants filed a motion to dismiss. December 2d, 1867, plaintiffs filed exceptions to the several answers. December 6th, 1867, N. M. Whitmore and D. Alden filed additional answers. January 11th, 1868, George F. Shepley, John B. Brown, and Horatio N. Jose filed their several answers, and defendants filed a reply to the exceptions to answers. February 7, 1868, the exceptions to the answers were overruled by Charles Danforth, a justice of the court, and the plaintiffs filed general replications to the several answers. Thence the case was continued to the March term, 1868, when and where the same was marked "Law on bill, answers, and proofs." April 16th, 1868, the plaintiffs filed a specification of their exhibits, and the defendants also filed a specification of their exhibits. Thence the case was continued from term to term to this term.

Amendments.

August term, 1867. S. J. C. Ken. Co.

K. & P. R. Co. ET ALS.
v.
P. & K. R. Co. ET ALS. } In eq.

And now the plaintiffs come, &c., and move the court for leave to amend their bill as follows, viz :

1st. By striking out the names of the stockholders joined as plaintiffs with the corporation, viz : William Rogers, S. Titcomb, George W. Dorr, Abram Rich, R. H. Gardiner, Frederick Gardiner, Smith C. Cox, Samuel S. Wing, Isaac Lincoln, and Charles Osborne, on pages one and eleven ; also the word "twenty" on page three, and inserting in lieu thereof, the word "ten."

2d. By striking out the word "fifty," and inserting in lieu thereof the words "two hundred," on page five of printed bill, line thirteen.

3d. By inserting the word "white" before the word "directors," in the fourth line on page six, and the figures "61" after the figures "18" in the fourteenth line.

4th. By inserting the words "and for the purposes aforesaid," after the word "aforesaid" in the tenth line on page seven; and the words "and directors" after the word "trustees" in the twenty-third line.

5th. By inserting after the word "same" in the thirty-fourth line on page seven, the words "as your orators are informed and believe;" and after the word "through" in the thirty-fifth line, the words "and under the mortgages given to secure the first and second mortgage bonds before named, and as holders of said bonds made and issued by;" and by striking out all the words after "company" in the thirty-sixth line, to the word "and" in the thirty-ninth line.

6th. By striking out the word "deny" in the ninth line on page eight, and inserting in lieu thereof, the words "do not admit."

7th. By striking out the words "the said William Rogers and others" after the word "orators" in the twenty-second line on page eight; and by striking out all the words after the word "aver" in the twenty-third line, to the word "that" in the twenty-eight line.

8th. By striking out the words "and redeem the same" in lines five and six on page nine, and inserting in lieu thereof the words "the

amount equitably due thereon, as the same shall be found by this honorable court, if anything," and by inserting after the word "mortgage," in line nine, the words "although your orators aver that they duly tendered to said trustees and bondholders the amount due upon said bonds and coupons on the day of , A. D. 1865, when the same were payable."

By A. G. STINCHFIELD, *their Solicitor.*

17 *Motion to dismiss.*

S. J. court. Ken. Co. Oct. T., 1867.

KEN. & PORT. R. R. Co. }
v. } In eq.
P. & K. R. R. Co. & ALS. }

And now the defendants come into court and move that this suit may be dismissed from this court, because the complainants have refused to comply with the terms on which they were allowed to amend their bill.

By BRADBURY & BRADBURY, *their Solicitors.*

In chancery. Oct. T. S. J. C., 1867.

K. & P. R. Co. }
v. }
P. & K. R. Co. ET ALS. }

This is a bill in equity; it was duly entered in this court at the November term, 1865, at which term the defendants severally filed demurrers to the bill. The demurrers were sustained by the court, with leave to amend on terms to be fixed by the judge at nisi prius.

At the August term, 1867, the plaintiffs duly filed their amendments, and they were allowed and made at said term of the court. The presiding judge directed the following entries made in the case: "Amendments to bill allowed; terms thereof to be fixed by Judge Danforth next term." "Defendants to answer in sixty days."

On the 12th day of October, John Patten, surviving trustee, one of the defendants, filed his answer in behalf of the trustees; but none of the other defendants filed their answers or complied with the order of the court.

At this term the other defendants moved for an extension of time within which to file their answers, and for terms; and the court, plaintiffs objecting, caused the following entries to be made on the docket:

"Time extended thirty days; terms as a condition of amend-
18 ment, that plaintiffs pay defendants' costs up to time of the allowance of the amendments."

To which order of the court the plaintiffs except, and pray that these their exceptions may be allowed.

By A. G. STINCHFIELD, *their Solicitor.*

Allowed.

C. DANFORTH, *Justice presiding.*

Answer of John Patten, trustee.

This defendant, saving, &c., for answer, says: That, as to the allega-

tions in said bill, that, in 1850, there existed in this State a legal corporation known as the Kennebec and Portland Railroad Company, holding and owning a certain railroad; that said corporation issued certificates of original stock, and certificates of preferred stock; that it also issued registered bonds to the contributors, to build the road from Portland to Yarmouth, and secured the same by deed of trust and mortgage; that it borrowed eight hundred thousand dollars of certain cities, towns, and individuals, and secured the same by deeds of trust and mortgage; that, in 1851, it issued and sold its bonds to the amount of $230,000, known as the first-mortgage bonds, and secured the same by deed of trust and mortgage; that, in 1852, it issued and sold its bonds to the amount of $250,000, known as the second-mortgage bonds of said road, and secured the same by deed of trust and mortgage; and that there existed, at the time of the filing of said bill, a corporation organized under the laws of this State, under the name of The Portland and Kennebec Railroad Company; this defendant believes that said several allegations are substantially true, as set forth in said bill.

And this defendant, further answering, saith that it is also true that, in 1857, the interest coupons that fell due after December 15th, 1855, on said first and second mortgage bonds not having been paid,
19 and the conditions of said mortgages having been broken, the said Joseph McKeen, Marshal S. Hagar, and this defendant, trustees as aforesaid, took the possession and management of said railroad, franchise, and furniture, in behalf of said second-mortgage bondholders, September 1st, 1857, in accordance with their direction, duly given at a meeting called, organized, and held for the purpose, and so continued to September 1st, 1860. And said trustees took the possession and management of said road, franchise, and furniture, as trustees of the first-mortgage bondholders, September 1st, 1860, under the direction of, and in behalf of, said first-mortgage bondholders, who, at a meeting duly called and held for the purpose, organized and gave such instructions; and said trustees continued such possession and management of said road, franchise, and furniture up to January 1st, 1864, excepting that they were dispossessed of the furniture for a time, under a claim given to Mr. Williams thereon, which was held to be paramount.

And this defendant, further answering, denies that said trustees carelessly, negligently, and unskilfully managed said road and its affairs while in their possession, and denies that the net earnings were $200,000 less per annum, or any less than they should or would have been under faithful management; and, on the contrary, he avers that, in the management of said road and its affairs, they, the said trustees, exercised their best skill and ability, and managed the same, during all the time said railroad was in their possession, faithfully, prudently, and well, and faithfully reported and applied all the net earnings of said road on claims prior to said bonds.

And this defendant, further answering, saith, as to the allegations in said bill, that the said McKeen, Hagar, and this defendant, trustees as aforesaid, combining with the said Alden, Whitmore, Sewell, and George
F. Patten, directors of said Kennebec and Portland Railroad Com-
20 pany, and with R. D. Rice, John B. Brown, George F. Shepley, and Horatio N. Jose, and with other persons, contriving and intending to obtain for themselves and their associates the possession, management, and ownership of said railroad, franchise, and rolling-stock, and to deprive the said Kennebec and Portland Railroad Com-

pany of all hope of profit therefrom, for that purpose bought up a large amount of original, preferred, and Yarmouth stock, bonds, coupons, mortgages, and other claims in and against said company, to the amount of $700,000 or thereabouts, for much less than their real value, and that the same were purchased with money belonging to said company, being the earnings of said railroads, that said allegations are not true; that this defendant never had part in or knew of any such combination and purchase as is in said bill alleged, *nor of any combination and purchase as in said bill alleged*, nor of any combination and purchase of the kind, nor had said other trustees, so far as he knows or believes, nor has he any knowledge or belief that any such purchase was made by the other trustees, or the other persons named in said bill, with the funds of said Kennebec and Portland Railroad corporation or net earnings of said road. As to the statements in said bill respecting the claims held by the Hon. Reuel Williams, this defendant, further answering, saith that he believes it is true that the said Williams was the owner of original and preferred stock, Yarmouth bonds, bonds, coupons, and claims, secured by mortgage of the rolling-stock of said road, to a large amount; but it is not true that said Williams offered to sell the same to said trustees, for the benefit of said complainants, for $113,000 or thereabouts, and that said trustees, contriving and intending to obtain for themselves and their associates the ownership of said railroad, declined to accept said offer and to make said purchase. Nor is it true that
21 afterwards said stock, bonds, coupons, and claims were purchased of said Williams by said Rice and Alden for the benefit of said trustees and their said associates, and for the purpose aforesaid, for $113,000 or thereabouts, which same was so paid to said Williams out of the earnings, profits, and income of said road. And this defendant further saith that said trustees, during the time that said Williams held said stock, bonds, and claims, had no funds of said Kennebec and Portland Railroad Company in their hands, with which to make said purchases, nor were they authorized by the bondholders whose trustees they were, nor by said railroad company, so to do. This defendant had nothing to do with, and no interest in, the purchase made by the said Rice of the said Williams, subsequent to this purchase. The first and second mortgage bondholders aforesaid, at meetings duly held by them respectively on the 28th of October, 1861, for the purpose of acting on the subject, instructed the said trustees to accept the proposition made by Judge Rice to said boards of bondholders to cancel or transfer to them the demands he had purchased of Reuel Williams, secured by mortgage on the personal property of the railroad and the city and town coupons for $110,000. After careful consideration of the subject, said trustees, satisfied it was necessary to secure the use of the rolling-stock that had been mortgaged to said Williams, in obedience to the instructions aforesaid, entered into an agreement with the said Rice for the purchase of said demands and claims, a copy of which is annexed, marked A, and made a part of this answer. This agreement was subsequently carried out by both parties, the payments made by said trustees to said Rice, and the demands, and coupons, &c., duly delivered by him to our treasurer. The payments thus made were charged in our account as trustees against the earnings of said road, belonging
22 to the first-mortgage bondholders, and were the only payments made by said trustees on account of the purchase of coupons, claims, &c. As said claims originally belonged to said Williams, though purchased by said trustees as aforesaid of the said Rice, to whom said Williams had sold them, they were referred to in our treasurer's report

and spoken of as the "Williams purchase," as a mode of designating the demands for which the payments were made. The purchase consisted of coupons of the cities and towns for over $54,000, secured by the mortgage first named on said road, not including five or six years' interest thereon, and notes of said Kennebec and Portland Railroad Company, amounting (without interest) to more than $119,000, secured by mortgage on the rolling-stock of said road and all its other personal property. At the time of the contract of purchase made with said Rice, the notes were supposed to amount to something less than the above amount. And this defendant, further answering to the allegation in said bill that the said Alden, Whitmore, Sewall, and George F. Patten, directors of said Kennebec and Portland Railroad Company, combining with the said McKeen, Hagar, and this defendant, trustees as aforesaid, and with their associates, for the purpose of becoming the owners of said railroad in violation of their trust, neglected to pay the interest upon and redeem said bonds, saith said allegations in said bill contained are not true. And he further saith that he never had part in or knowledge of any combination not to pay the interest on said bonds, and that the reason said trustees did not pay the interest thereon was because they were unable to realize enough from the earnings of said road so to do, after the necessary appropriation of said earnings on necessary expenses and prior claims. They were not only without the means, as trustees, to pay said interest coupons on said bonds, but they were
23 compelled to borrow money on their own account, on their individual personal security, to purchase wood and meet other necessary expenses in operating said road, and in order to pay the city and town coupons and other prior mortgage claims, to prevent said road from being taken from their hands as trustees, and passing into the hands of those representing prior mortgages thereon. During the time said railroad was in the hands of said trustees, to raise money as aforesaid, they gave their individual notes at different times, for different sums, amounting in the aggregate to more than $200,000. As to the allegation in said bill respecting the bill in equity brought under the sanction of Allen Lambard, and its dismissal, this defendant has no knowledge, except from hearsay, and had nothing to do therewith. And said defendant, further answering, saith, as to the allegations in said bill, that, from the time when said trustees became possessed of said railroad and franchise, the same was of sufficient value, if properly administered according to the true interest of the trusts and of the equitable liens with which the same was charged by the Kennebec and Portland Railroad Company, to have paid the interest upon said bonds and redeemed the same, but that the directors and trustees aforesaid, in disregard of their trust, used and applied the same to purchase stock, bonds, coupons, and claims for the benefit of themselves and their associates, this defendant avers that said allegations set forth in said bill are not true, and that said railroad and franchise were not of the value therein set forth, and that the full and just income of said road was only the amount that said trustees accounted for and applied to meet the proper expenses of operating said road, and to pay the claims thereon by virtue of prior mortgages, which they were by law required first to pay, and that they had no funds remaining with which to redeem said bonds, or to
24 pay the interest thereon, and that no part of said income or earnings were by them applied for the purposes stated in said bill. And, further answering, he says that the said Portland and Kennebec Railroad Company was created a body corporate, as he understood, in November, 1862, formed by the organization of the second-mortgage

bondholders aforesaid, after the foreclosure of said mortgage. Said Kennebec and Portland Railroad Company neglected to pay its semi-annual coupons upon its second-mortgage bonds (as well as those upon its first-mortgage bonds) that fell due after April 1st, 1856, within ninety days after there had been due presentation thereof for payment after the same were due, and of all said coupons remaining unpaid the holders of more than one-third of said dishonored second-mortgage bonds in amount on the 15th of April, 1859, made application to said trustees to have the mortgage secured, said bonds and coupons foreclosed; and said trustees, on the 18th of May, 1859, issued their notice in writing, under their hands, in accordance with the requirements of the statute, claiming the foreclosure of said mortgage by reason of the breach of the conditions thereof, which notice (a copy whereof is hereunto annexed and marked B, and made a part of this answer) was published three weeks successively in the Kennebec Journal, a newspaper published by the State printer in Augusta, in the county of Kennebec, the first publication thereof being on the 20th day of May, 1859, and in the Brunswick Telegraph, a newspaper published in Brunswick, in the county of Cumberland, the first publication thereof being on the 20th day of May, 1859, and in the Bath Times, a newspaper published in Bath, in the county of Sagadahoc, the first publication thereof being on the 20th day of May, 1859, and in the Age, a newspaper published in Augusta aforesaid, the first publication being on the 26th day of May, 1859, these being all the counties into
25 which said road extends, and caused a copy of said notice to be recorded in the office of the register of deeds, with the name and date of each of said newspaper' containing it, in the county of Cumberland on the 21st day of June, 1859, in the county of Sagadahoc on the 22d day of June, 1859, and in the county of Kennebec on the 23d day of June, 1859, said recording in the office of the registry of deeds in said counties, also being within sixty days of the time of the first publication aforesaid. And said Kennebec and Portland Railroad Company continued its neglect to pay to said dishonored coupons, and also to pay the coupons that fell due after the publication of said notice, and said coupons first named, to the amount of many thousand dollars, were presented to said trustees for payment more than thirty days before the time of redemption expired, to wit, three years from the time of the final publication of notice aforesaid, and remained in their hands for payment until long after the expiration of said time of redemption. And none of said dishonored coupons were paid, nor did said Kennebec and Portland Railroad Company furnish any funds to pay the same, nor was there any funds in the hands of the trustees to pay them, nor was there any tender of payment thereof, nor any bill in equity commenced to redeem said mortgage, and the same was then foreclosed. After said foreclosure, said second-mortgage bondholders, on the 5th day of November, 1862, at a meeting duly notified, called, and held for the purpose, organized themselves into a corporation, in accordance with the provisions of the statute in such cases provided, and adopted the name of the Portland and Kennebec Railroad Company, and have continued a corporation to the present time. And said trustees, in further execution of their trust, afterwards, on the day of , 1864,
conveyed to said corporation, formed of the holders of the bonds
26 for whose benefit the property had been conveyed to them in trust, the right and interest acquired by the deed securing said second-mortgage bonds, subject to all prior claims, that the property might be made available according to the law and the interest of said trust. And

this defendant, further answering, saith that there was no agreement between him and the said Hagar and Rice or any other person that he was, or was to be, interested in any way in the purchase made by said Rice of said Reuel Williams, nor did he, or either of the trustees to his knowledge or belief, suggest or direct the making of said purchase by said Rice in behalf of the bondholders. And he further says that he was not interested in said purchase, and that neither said Rice 'or Alden 'or any other person agreed to deliver to him any of the stock, bonds, coupons, or claims purchased of said Williams. And this defendant, further answering, saith that, at the commencement of the enterprise, he took and paid for, to said corporation, a large amount of the original stock and preferred stock and Yarmouth bonds, and first and second mortgage bonds, paying for said stock at par, and said bonds as others paid. The amount thus taken he cannot now state accurately; and that he and George F. Patten advanced several thousands of dollars for iron rails, &c., for the road, for which said corporation now owes them. Some time subsequent to the purchase of the coupons, claims, &c., of said Rice, by the trustees for the bondholders, in a settlement with said George F., this defendant received from him some of the bonds which he presumes he had of said Rice, that came from said Williams, the amount being about two thousand dollars of the first, and about two thousand dollars of the second mortgage bonds, and this defendant does not recollect of any other purchase of the stock or bonds of said road. The claims alluded to by him in this answer as "prior
27 claims," on which the trustees applied the net earnings of the road, were the accruing coupons on the city and town bonds, Yarmouth bonds, and bonds secured by the mortgage of the one-twentieth of the road, and the sinking fund provided for in the deed of trust and mortgage to secure the cities and towns aforesaid. And this defendant further saith that the trustees, after they took possession of said road in pursuance of the vote and order of the bondholders, they employed a gentleman of good reputation for skill, experience, and integrity as superintendent thereof, together with the usual force for operating and repairing the road. That said trustees gave such personal attention to the business as was requisite on their part. Their earnest efforts and best endeavors were used to realize for the bondholders and corporation as much as was practicable. The sinking fund required to provide for the extinction of a portion of the debt due to the cities and towns was largely in arrears, and there was a large amount of overdue coupons of the cities and towns, all secured under the mortgages on the road that had precedence to those securing the first and second mortgage bonds. Then the accruing interest on the city and town and Yarmouth loan, called for all the earnings of the road that remained after paying the necessary expenses of operating and repairing the road. The trustees were in possession for the first-mortgage bondholders after September 1st, 1860, who had the right to all the surplus earnings that remained after the discharge of prior claims, to be applied on their overdue coupons. And said first-mortgage bondholders had, in the month of , 1860, commenced proceedings for the foreclosure of their mortgage. The time of redemption from this mortgage was running out; the corporation was duly involved in debt; stockholders, who had not claims to offset, conveyed or gave away their stock to
28 avoid the liability of stockholders; no means were furnished for the redemption of either mortgage or to prevent the foreclosure of them, by the corporation or stockholders, saving what could be obtained from the earnings of the road, which was necessarily subject to

prior legal claims, that required all the earnings above the necessary expenses; the trustees had not the means to add to the rolling-stock and to adequately equip the road; it was only by allowing the new corporation to go into possession and management of the road, which was done with the consent of the first-mortgage bondholders, that measures could be taken to prevent the foreclosure of that mortgage. For a detailed statement of the receipts and expenditures by said trustees, this defendant refers to the annexed six annual reports, marked 1, 2, 3, 4, 5, 6, made by them and their superintendent and treasurer, which he prays may be referred to as a part of his answer. He believes the same to be substantially correct, and that the treasurer's reports contain a fair and full statement of the receipts and expenditures by said trustees, and of the earnings of said road while in their possession. These reports, from the time they were respect*fully* made, have ever been open for the examination of all persons interested in said road. It may be necessary to state, in order to a full understanding of the treasurer's accounts above named, that the item put down with the assets as "suspense account," or "S. & K. Railroad," consisted of an unsettled and disputed claim against the road, from which, on settlement, little or nothing was realized. "Land in Portland," represented the amount paid for a parcel of land it became necessary to purchase, as our road owned no land there for a depot. "Yarmouth road," represented the amount of dividends withheld from their bondholders in any emergency, with the assent of all or most of them. "Real estate in Bath," repre-
29 sented the amount necessarily expended in the repairs of a wharf belonging to said road. And, further answering, this defendant says that he does not know or believe it to be true that any tender of the amount due upon either the first or second mortgage bonds aforesaid, has ever been made, either to the trustees or the bondholders, or to any one in their behalf, nor has he any knowledge that any demand has been made upon said trustees or said Portland and Kennebec Railroad Company of the rents, income, or profits, and money expended in repairs and improvements of said road, nor of the amount due on the mortgages.

JOHN PATTEN.

Answer of the Portland and Kennebec Railroad Co.

This defendant, saving, &c., for answer says: That as to the allegations in said bill that, in 1850, there existed in this State under authority of law a corporation known as the Kennebec and Portland Railroad Company, holding and owning a certain railroad as set forth in said bill; that said corporation issued certificates of original and of preferred stock; that it issued also registered bonds to the contributors to build the road from Yarmouth to Portland, and secured the same by deed of trust and mortgage; that it borrowed, for the purpose stated, of certain cities, towns, and individuals, $800,000, and secured the same by deed of trust and mortgage; that, in 1851, it issued and sold its bonds to the amount of $230,000, known as the first-mortgage bonds, and secured the same by deed of trust and mortgage; that, in 1852, it issued and sold its bonds (with semi-annual coupons thereon) to the amount of $250,000, known as the second-mortgage bonds, and secured the same by deed of trust and mortgage, this defendant corporation supposes that said several allegations as set forth in said bill of
30 complaint, are substantially true, with the qualification that, in 1850, only a portion of said road was completed. And this de-

fendant corporation, further answering, saith that it is also believed to be true that, in 1857, Messrs. Patten, Hagar, and McKeen, the trustees in the deeds of trust and mortgage made to secure the first and second mortgage bonds aforesaid, the interest on said bonds not having been paid, took possession of said road, franchise, and furniture in behalf of said bondholders, and under their direction, they having duly organized for that purpose, pursuant to the requirements of the law, and so continued in possession until January 1, 1864, excepting that they were dispossessed of the furniture by a paramount claim thereon, held by Reuel Williams, to whom they were required to make payment for its use. And this defendant corporation, further answering, saith that it has no knowledge or belief that said trustees, carelessly, negligently, or unskilfully managed said road while in their possession, nor that the net earnings were $100,000 less, nor any less than they should have been. Nor has this defendant any knowledge or belief of any fraud or combination to defeat the complainants, as alleged in said bill, by the purchase of stock, bonds, or other claims against said road or otherwise, nor has it any knowledge of or belief of the application of any of the funds of said company, or of the income of said road for such purchase. Nor has this defendant any knowledge or belief that any of the directors in the plaintiff corporation combined with the trustees aforesaid and their associates, and, for the purpose of becoming the owners of said railroad, they or any of them neglected to pay the interest upon and redeem the bonds of said road. Nor does this defendant know or believe that, from the time said trustees took possession of said road, the earnings thereof were sufficient, nor that with the proper adminis-
31 tration of said trust they could have been made sufficient, to have paid the interest on said bonds, and to have redeemed the same, nor that said trustees disregarded their trust and applied the same to the purchase of the stock, bonds, coupons, and other claims for the benefit of themselves and their associates.

And this defendant corporation, further answering, saith that it is true that it was created a body corporate in 1862, formed by the organization of the second-mortgage bondholders into a corporation, after the foreclosure of said mortgage, under the name of the Portland and Kennebec Railroad Company, in pursuance of the statute in such case provided.

And this defendant further saith that the Kennebec and Portland Railroad Company aforesaid neglected and refused to pay the semi-annual coupons upon its second-mortgage bonds, as well as those upon its first-mortgage bonds, that fell due after April 1, 1856, up to and including those payable April 15, 1859, for more than ninety days after the same fell due and were duly demanded, (excepting only that the coupons that fell due April 15, 1859, had not been due and demanded for so long a time,) and the holders for more than one-third of the whole of said second-mortgage bonds in amount, secured by said mortgage, on which were said dishonored coupons, made application in writing to the trustees aforesaid to have the mortgage securing said bonds, and coupons, thereon, foreclosed. And said trustees, on the 18th of May, 1859, issued their notice in writing, under their hands, in accordance with the requirements of the law, claiming the foreclosure of said mortgage for breach of the conditions thereof, which notice (a copy whereof and of said mortgage are hereunto annexed, marked A, and made a part of this answer) was published three weeks successively in each of the following papers, viz: in the Kennebec Journal, a newspaper
32 published by the State printer, in Augusta, in the county of Ken-

nebec, the first publication being on the 20th day of May, 1859; and in the Brunswick Telegraph, a newspaper published in Brunswick, in the county of Cumberland, the first publication being on the 20th day of May, 1859; and in the Bath Times, a newspaper published in Bath, in the county of Sagadahoc, the first publication being on the 20th day of May, 1859; and in the Age, a newspaper published at Augusta, in the county of Kennebec, the first publication being on the 2d day of June, 1859, and caused said printed notice, with the names and date of each of said newspapers containing it, to be recorded in each of said counties in the registry of deeds, the same being all the counties into which the railroad aforesaid extended, to wit, in said registry in the county of Kennebec on the 23d day of June, 1859; in the county of Cumberland, on the 21st day of June, 1859; in the county of Sagadahoc, on the 22d day of June, 1859, all being within sixty days of the time of the first publication aforesaid. And said Kennebec and Portland Railroad Company continued its neglect and refused to pay said dishonored coupons, though the payment thereof after they fell due, was duly demanded, and though said coupons, to the amount of over forty thonsand dollars, were presented to the trustees aforesaid, more than thirty days before the time of redemption of said mortgage expired, to wit, more than thirty days before the 20th of May, 1862, and remained in the hands of said trustees for payment until long after the expiration of said time of redemption, and none of said dishonored coupons were paid, nor was there any tender of payment thereof, nor means procured for their payment, nor any bill in equity brought to redeem the said mortgaged property, nor any money in the hands of said trustees which they could apply to redeem the same. And more than three years having elapsed from the time
33 of the publication of the notice aforesaid, and said mortgaged property not having been redeemed, said second-bond mortgage was foreclosed, pursuant to the statute in such case provided. And this defendant corporation, further answering, says that, afterwards, on the 5th day of November, 1862, the holders of said second-mortgage bonds (said mortgage having been foreclosed as aforesaid) duly organized and formed themselves into a corporation under the name of The Portland and Kennebec Railroad Company, in pursuance of the statutes in such case provided, and adopted by-laws and elected officers, and have since been, and continued to be a duly organized and lawfully created railroad corporation, and were such at the time of the filing of the complainants' bill in the case as is therein set forth and admitted. And this defendant corporation, further answering, says that the holders of the first-mortgage bonds aforesaid, all the coupons thereon having remained unpaid, which fell due after April 1st, 1856, though the payment of a large portion thereof had been legally demanded more than ninety days after they fell due, organized in accordance with the provisions of the statute, and, at a meeting duly called, notified, and held on the 14th day of December, 1859, by a vote duly passed, directed the trustees aforesaid of said first mortgaged bonds to enter into the possession of the mortgaged premises, for the purpose of running and managing the same in behalf of said first-mortgage bondholders, on the first day of September then next. And said trustees having taken possession in behalf of said first-mortgage bondholders, on said first day of September, continued therein, therefor, and in the management of said road and in the receipt of the earnings thereof, until January 1st, 1864, this corporation not having succeeded in effecting an arrangement with the said first-mortgage bondholders for the possession of the road
34 until that time, since which it has retained the possession and

management thereof. In accordance with provisions of the statute, the trustees aforesaid, on the 1st day of January, A. D. 1864, conveyed the right, title, and interest derived by virtue of the deed to them of October 18th, 1852, (subject to prior mortgages in and to the railroad, franchise, and furniture,) to this corporation, composed of the holders of the bonds, to secure which, said conveyance of October 15th was made to them. And this corporation made arrangements with the first-mortgage bondholders to prevent the consummation of the proceeding to foreclose that mortgage. The overdue coupons have been consolidated and partially paid, and the coupons falling due since that time upon said first-mortgage bonds, and upon the city and town bonds, and the Yarmouth stock, have been regularly paid out of the earnings of the road. From its defective construction, and other causes, said road was in a bad condition, needing large outlays for repairs and reconstruction. It was very inadequately furnished, and what furniture there was had long been in use and was much worn. No legal right of way was owned or secured, for a long distance from the depot of the P., S. & P. Railroad, in Portland, and there was no depot accommodations to which the corporation had any legal right. The trustees, as a measure of necessity to the success of the road, had made a beginning and purchased a parcel of land for a depot. It became absolutely essential to the success of the road that large expenditures should be made, over and above the net earnings, to purchase lands for adequate depot accommodations, to procure the right of way for several miles, and build a new road from Westbrook to the intersection with the Portland, Saco and Portsmouth Railroad, and then to prepare the grounds and erect freight and passenger depots suitable for the accommodation of
35 the business. To procure the means to make these necessary outlays, it became necessary to raise money on a mortgage of the property purchased. The legislature, by an act passed January 28th, 1865, authorized this defendant corporation to build a road upon its new location, and to issue its stock and raise funds with which to construct said road and to make improvements upon other portions of its line and equipments, and to extinguish prior incumbrances on said road, by loan, and stock secured upon the whole line of said road, subject to prior incumbrances. And in pursuance of said authority, this corporation, for the purposes aforesaid, has issued and sold its stock to the amount of $150,000, or thereabouts, and has issued and sold its bonds to the amount of $300,000 or thereabouts, and secured the same by a deed of trust and mortgage to James T. Patten and others, trustees, dated April 1, 1865. The lands for depot accommodations in Portland cost, including the amount paid by the trustees, about $132,000, and were mortgaged by this company for $100,000, prior to the mortgage aforesaid. The depot buildings, &c., cost about $42,000, and the new road and right of way about $67,000. Large expenditures have been made all along the line of the road to render it safe for the public travel, and were absolutely essential to be made. Said road has been operated in connection with the Somerset and Kennebec Railroad, having taken a lease thereof for a period of twenty years, from October 1, 1863, at an annual rent of $36,000 per year. The accompanying reports for the years ending January 1, 1865, 1866, and 1867, exhibiting the receipts and expenditures of said company, marked 1, 2, 3, are referred to as a part of this answer. From these it will be seen that the road and furniture were in a dilapidated condition, and had been so imperfectly
36 constructed, and was so deficient in depot accommodations that it required not only all the net earnings of the road, after deducting

the running expenses and paying interest on the mortgages prior to the claims of the second-bond stock, but a large amount besides, which has been procured by the mortgage of the lands in Portland, and by the sale of the bonds and stock issued under the authority of the act of January 28th, 1865, as aforesaid, to put the road and equipments in a suitable and safe condition. And there is much more that the interest of the road requires yet to be done.

And this defendant, further answering, denies that at any time the said Kennebec and Portland Railroad Company or any person in its behalf, has ever paid or tendered payment or offered to pay said second-mortgage bonds or the overdue coupons aforesaid thereon. And this defendant does not admit that, in 1862, or thereabouts, or in August, 1865, said Kennebec and Portland Railroad Company, duly demanded of this defendant, or of the trustees, a true account in writing of the amount due on the mortgages given to secure said first and second mortgage bonds, and of the rents, incomes, and profits, and moneys expended in repairs and improvements of said mortgaged property, nor that it had unreasonably refused and neglected to render such account, or to allow said complainants to redeem the same. On the contrary, this defendant saith, that the books of said trustees, and the books and reports of this corporation, showing in detail all the receipts from said railroad, and all the expenditures in operating the same, and the amounts and purposes for which all the moneys received by said trustees and by this company respectively were applied, have at all times during business hours been kept open for the examination of the complainants, and of all persons interested therein.

37 And, further answering, this defendant saith that said complainants, if they desired to redeem said mortgaged property, should have done so prior to the foreclosure of the mortgage as aforesaid, by paying or tendering payment of the amount required by law, to be paid to defeat said foreclosure. And that, inasmuch as said complainants neglected so to do, and allowed said mortgage securing said second bonds to be foreclosed, they have now no right to redeem said mortgaged property, nor to demand any account, nor that any conveyance should be decreed to be made to them upon said mortgaged property upon any terms. And this defendant further says that the complainants made no effort to prevent the mortgage securing the first-mortgaged bonds from being foreclosed, proceedings having been commenced for the foreclosure of said mortgage in February, 1861, as is understood, and but for the timely interference of this defendant corporation, said first mortgage would have been foreclosed, and all subsequent claimants shut out.

And this defendant, further answering, denies that the complainant corporation at the time of the filing of the bill in this case, was or now is, possessed or seized of the equity of redemption of the mortgaged property aforesaid, or any portion thereof.

PORTLAND AND KENNEBEC R. R. CO.

[SEAL.] By R. D. RICE, *President.*

Answer of Richard D. Rice.

This defendant, saving, &c., for answer, says: As to the allegations in said bill that, in 1850, there existed a corporation known as the Kennebec and Portland Railroad Company, holding and owning a certain railroad; that said corporation issued certificates of original stock, and certificates of old perferred stock; that it issued also registered bonds

to the contributors to build the road from Portland to Yarmouth,
38 and secured the same by deed of trust and mortgage; that it borrowed for the purposes stated, of certain cities, towns, and individuals, $800,000, and secured the same by deeds of trust and mortgage; that, in 1851, it issued and sold its bonds to the amount of $230,000, known as first-mortgage bonds, and secured the same by deed of trust and mortgage; that, in 1852, it issued and sold its bonds to the amount of $250,000, known as second-mortgage bonds, and secured the same by deed of trust and mortgage, this defendant supposes the said allegations, as set forth in said bill of complaint, are substantially true, excepting that a considerable portion of said road was not constructed in 1850. And this defendant, further answering, saith that he believes it to be true that, in 1857, Messrs. Patten, Hagar, and McKeen, the trustees named in said deeds of trust and mortgage, to secure said bonds, the interest on said first and second mortgage bonds not having been paid, took possession of said railroad, franchise, and furniture, in behalf of the bondholders, and so continued in possession until 1864, or thereabouts, receiving the income thereof, excepting that they were dispossessed of the furniture by a paramount claim thereon, held by Reuel Williams, to whom they were required to make payment for its use. And this defendant, further answering, saith that, after the said Patten, Hagar, and McKeen took into their own hands, as trustees for the bondholders, the possession and management of said railroad, in pursuance of the statute in such case provided, the president and directors of said company had not, as he supposes, either the right or the responsibility of administering its affairs, and that the trustees are holden only for the honest and faithful discharge of their trust. And this defendant, further answering, saith that he neither knows nor believes that said trustees, carelessly, negligently, or unskilfully managed said railroad while in their possession, nor that the net
39 earnings and income thereof, were annually $200,000 less, or any less, then they should have been; but, from the best information and knowledge he has on the subject, he believes said trustees managed said road with great fidelity, and to the best of their ability. And this defendant, further answering, saith as to the allegations in said bill, that the said McKeen, Patten, and Hagar, while acting as trustees as aforesaid, combining with said Messrs. Alden, Whitmore, Sewall, and George F. Patten, directors of said Kennebec and Portland Railroad Company, and with John B. Brown, George F. Shepley, and Horatio N. Jose, and this defendant, and other persons unknown to the complainants, contriving and intending to obtain for themselves and their associates, the possession, management, and ownership of said railroad, franchise, and rolling-stock, and to deprive the Kennebec and Portland Railroad Company, the complainants, thereof, and of all hope of profit therefrom, for that purpose bought in a large amount of the said original, preferred, and Yarmouth stock, bonds, coupons, mortgages, and other claims, which said company were liable to pay, to the amount of $700,000 or thereabouts, for much less than their real value, with money belonging to said company, being the earnings of said railroad; that this defendant never had part in or knew of any such combination or purchase; that, so far as he knows or believes, said allegations in said bill are not true; that this defendant never knew of, or had part in any combination to purchase any of the stock, bonds, mortgages, or other property, as specified in said bill, with the money belonging to said company. As to the allegations in said bill respecting the claims held by the Hon. Reuel Williams, and the purchase thereof, this defend-

ant, further answering, saith that it is true that the said Williams held and owned stock, bonds, and claims upon said road to a large
40 amount, as will hereinafter more fully appear; that, in 1861, this defendant entered into negotiations, on his own account, with the said Williams, for the purchase thereof; that, in September, the said Williams having proposed that he would sell to this defendant, all his said claims and interest in and against said railroad company, on certain terms, for $113,000, the proposition was agreed to by him, and the bargain made by them was then and there reduced to writing, in the form of a proposition by this defendant and an acceptance by the said Williams, a copy of which bargain and purchase is hereunto annexed, marked A, and made a part of this answer. During the negotiation, B. H. Cushman and Darius Alden had said to this defendant that they would take an interest in said purchase, if it could be made for a certain sum, and he has the impression that General Shepley had so said, and George F. Patten and William D. Sewall had also said to him that they would take an interest. The advance payment of $23,000 made upon the execution of the contract, was raised and paid by the defendant, said George F. Patten and Sewall assisting him in raising the money. There was an understanding that said Patten and Sewall were to find associates for one-half and this defendant for the other half of the purchase; but none of said persons gave to this defendant any written agreement to take any part of said purchase for several months—he alone entered into the contract, he alone was bound to said Williams thereby, and it rested on him alone for some considerable time. And, further answering, this defendant saith that he does not know of or believe that the said Williams offered to sell and dispose of his stock, bonds, and claims aforesaid, to said Patten, McKeen, and Hagar, trustees as aforesaid, for $113,000, for the benefit of said Kennebec and Portland Railroad Company, and for much less than their real value, but that said trustees, contriving and intending to obtain for them-
41 selves and their associates the ownership of said railroad, declined to accept said offer and make said purchase; he has no knowledge of or belief of any such offer to said trustees, nor of such refusal by them, nor does he know or believe that they had any authority or funds as trustees to make such purchase, or that it was their duty so to do in the proper exercise of their trust. And this defendant, further answering, saith that the purchase from said Williams aforesaid, was not made for the benefit of said trustees and their said associates, nor for said Kennebec and Portland Railroad Company, nor for or on account of the bondholders on said road, nor at the request, instigation, or direction of said trustees, nor was the sum of $113,000 or thereabouts paid to said Williams for said purchase out of the earnings of said road or its income and profits, nor was he required in good conscience to surrender the stock, bonds, coupons, and claims purchased by him of the said Williams as aforesaid to the said Kennebec and Portland Railroad Company, nor that he ought now to do so, because he saith that he made the purchase aforesaid from said Williams for himself and such persons as he saw fit to associate with himself, and not for or for the benefit of said corporation or its bondholders, and with his own money, and not that of said corporation, and that none of the earnings of said road were used by said trustees in payment of the purchase of said Williams, but that $110,000, which he supposes were of such earnings, were used by them in payment for the coupons and claims, purchased of this defendant by said trustees under the direction of the bondholders, as will hereafter appear. And this

defendant, further answering, saith that he does not know or believe that the said Alden, Whitmore, Sewall, and George F. Patten, directors, combined with the said McKeen, Hagar, and John Patten, trus-
42 tees as aforesaid, and their associates, and for the purpose of becoming the owners of said railroad, neglected to pay the interest upon and redeem the bonds of said road. But he does understand that a bill in equity was brought in the name of said company, under the sanction of Allen Lambard, its president, without any legal authority, and that said bill was dismissed by the court. And this defendant, further answering, saith that he does not know or believe that, from the time the trustees aforesaid took the possession of said road, the earnings thereof were sufficient, or with the proper administration of said trust could have been made sufficient, to have paid the interest on said bonds, and to have redeemed said bonds, nor does he know or believe that said earnings should have been so applied, and that said trustees disregarded their trust and applied the same to the purchase of stock, bonds, coupons, and claims for the benefit of themselves and their associates. And this defendant, further answering, saith that he understands it to be true, as stated in said bill, that, in 1862, the Portland and Kennebec Railroad Company was created a body corporate formed by the organization of the second-mortgage bondholders of said railroad company, after the foreclosure of said mortgage, pursuant to the statute in such case provided, and that said new corporation commenced to manage and operate said road on the first day of January, 1864, and has since continued to operate the same, and has applied the net proceeds to pay the claims upon said road standing prior to said second mortgage, excepting only a dividend of three per cent. upon the stock of the new company, as by law they were required to do. And this defendant admits that the allegation in said bill is true, that the Portland and Kennebec Railroad Company aforesaid, is a corporation duly organized under the laws of said State of Maine. And this defendant,
43 further answering, saith that he does not know that said Kennebec and Portland Railroad Company in 1862, or in1865, duly demanded of the trustees, nor of the Portland and Kennebec Railroad Company, an account in writing of the amount due on the mortgages and of the rents, income, and profits, and of the money expended in repairs and improvements of said mortgaged property, that they might redeem the same, nor that they ever offered to pay the amount due on said mortgages, or to redeem the same, nor does he believe such offer was ever made. And this defendant, further answering, saith in response to the specific interrogatory propounded to him, that neither the Williams purchase aforesaid, nor the negotiation therefor, was made at the request or suggestion of John Patten, Marshal S. Hagar, or Joseph McKeen or either of them, nor by the direction of or in behalf of the holders of said bonds. Whether any of said trustees may have known of said negotiation and purchase, this defendant is unable to say, excepting in regard to said Hagar; he did know that this respondent had proposed to the said Williams to purchase, and said to this respondent that he should be willing to take an interest, if the purchase could be made for $106,000. Subsequently, the said Hagar having deceased, the attorney of his administratrix, claimed that he, as an associate with George F. Patten, was entitled to one-tenth of the purchase, and a settlement was made with his estate accordingly. This defendant does not know that John Patten or Joseph McKeen knew of or had any interest in said purchase, nor that they have received any of the stock, bonds, or other proceeds of said purchase. As to the disposition made by this defendant of bonds, cou-

and other claims, purchased by him of the said Williams, further answering, he saith that, subsequent to said purchase, a proposition was made to him by responsible persons to pay him $113,000, for the city and town coupons he had so purchased, then amounting, without interest, to about $54,066, and the notes and other claims for advances made by said Williams to said road, secured by mortgages on the rolling-stock and other personal property of said company, duly recorded, amounting as was then estimated to about $101,840, but which afterwards proved to amount to about $119,459, without interest. That this defendant, willing to give the bondholders an opportunity to make the purchase, if they should desire so to do, submitted a proposition to them in writing, (a copy of which is annexed, marked B, and made a part of this answer,) which was presented to them at meetings held by the said first and second mortgage bondholders, respectively, at Brunswick, on the 28th day of October, 1861. That said bondholders passed votes of instruction at said meetings to their trustees to accept the proposition submitted as aforesaid, that said trustees finally closed with said proposition, and entered into a contract with this defendant, to make the purchase, on the 17th of February, 1862, a copy of which contract is hereunto annexed, and made a part of this answer and marked D. This contract has been performed on the part of said trustees, and this respondent delivered over to J. S. Cushing, the treasurer of said trustees, the demands named therein, upon its performance, and took his receipt therefor; and he further saith this is the only contract he made with said trustees respecting said bonds and claims, (see copy of receipt annexed.)

This defendant, further answering, saith that, on the 17th of May, 1862, he entered into an agreement in writing with John B. Brown and others, a copy of which is hereunto annexed, marked E, and made a part of this answer, which agreement has been carried out by the parties respectively, and the proportion of the bonds and other claims against
45 said road, (excepting those embraced in the contract with the trustees,) to which each person under said agreement was entitled has been delivered to him. And this defendant further saith that he has no knowledge that the said John Patten was, directly or indirectly, interested in said purchase, nor that any person delivered or agreed to deliver him any portion thereof. Nor did he deliver any portion thereof to the said George F., or any other person in trust for or for the benefit of said John. And this defendant, further answering, saith that he cannot specifically state what amount of stock, bonds, coupons, and claims which said complaiaant corporation were liable to pay, he has purchased or received, of whom, and at what prices. He has, however, a recollection that he took and paid for at par, some thousands of dollars of the original stock at the early part of the enterprise. Since that time he has bought, when occasion presented, some of the stock and bonds of said Kennebec and Portland Railroad Company, as they were selling in the market, or at private sale, but in all cases he has paid for them with his own money, and he respectfully submits to the court that this is a sufficient answer to an enquiry that he regards as impertinent.

And this defendant, further answering, does not admit that said complainant corporation has any claim upon or right to the bonds purchased of the said Williams, until it shall pay the same, nor that it has any right to redeem the property mortgaged to secure the second-mortgage bonds aforesaid, said mortgage having become foreclosed. Nor does he admit that the proceedings have any validity, by virtue of

which William M. Reed and others, claim to have been elected directors, and the said Reed president of said company, and he prays that this answer shall not be construed as implying such admission. But he ma'ntains that Allen Lambard, and the other persons named in
46 said bill as elected in 1864, continued to be and are now the directors thereof, and that the pretended organization with said Reed as president, has no validity whatever.

And this defendant further says that, at the time he was negotiating with the said Reuel Williams, the railroad aforesaid was in a dilapidated condition, and the company overwhelmed with debt, without credit and utterly bankrupt, and the first-mortgage bonds selling in the market at from twenty-five to thirty-five, and the second-mortgage bonds at from ten to twenty per cent. of the face of the bonds.

R. D. RICE.

Answer of Sarah Hagar, adm'x.

This defendant, saving, &c., for answer, says: That she has no personal knowledge of the facts set forth or inquired about in said bill except as hereinafter appears; but that she has heard read, and made herself acquainted with the answer made by Mr. John Patten and filed in this case, and with the contents thereof, and she believes the same to be true, and she prays that the same may be received as her answer in this case as fully as incorporated herein.

And, further answering, this defendant says that she has no knowledge that the said Marshal S. Hagar, her late husband, was interested, or that there was any agreement with him that he was to be interested in the Williams purchase, that is, the purchase of stock, bonds, coupons, and claims that were, as she understands, made by Judge Rice of Reuel Williams, nor has she any recollection of ever having heard her said husband say that he was to have any interest therein. After his decease, which occurred in February, 1862, her attorney in the settlement of his estate, N. M. Whitmore, esq., advised this defendant to claim an interest in said purchase, and that he thought the estate ought to
47 have it, that her husband had done and suffered so much for the railroad, Judge Rice would not object to it; the claim was accordingly made, and the agreement of May 17th, 1862, between said Rice and others, a copy of which is annexed to his answer in this case, (which she has seen,) was signed in her behalf, by her authority, and to which she here refers as a part of her answer, by which she became entitled to one-tenth of the said purchase on the same terms as the said Rice. And she further says that she subsequently received from said Rice one-tenth of the first and second mortgage bonds and of the Yarmouth stock embraced in said purchase, and, as she understood, on the same terms as the said Rice, taking the same in behalf of the estate of her husband. And, further answering, she says that she has no knowledge of her said husband purchasing any bonds or stock in said railroad while the same was in the possession of said trustees; that she has no knowledge or belief that said trustees negligently, carelessly, or fraudulently managed said road while in their possession; that she has no knowledge or belief that there was ever any such combination or purchase as in said bill alleged; that she has no knowledge or belief that said trustees misappropriated any of the earnings of said road, or applied the same to the purchase of any of the stock, bonds, coupons, or other claims against said road for themselves or others, or that they made any such purchase, (save only the purchase of the coupons

and demands secured by mortgage of the personal property purchased of Judge Rice for the bondholders under their vote, as she has been informed.) And she has no knowledge or belief that said trustees were guilty of any neglect to pay the coupons on said bonds and prevent a foreclosure of the mortgage, or that they combined so to do, or that they misapplied any of the earnings of said road, or failed to
48 apply the same where they ought so to do. And she, further answering, says that she has no knowledge that the said Marshal S. Hagar and John Patten or either of them were, in any way, directly or indirectly, interested in any purchase of any stock, bonds, mortgages, coupons, or claims of said Kennebec and Portland Railroad Company, nor that there was any agreement or understanding between them and said Rice that they were or were to be in any way interested in the purchase by said Rice from Reuel Williams, nor that they or any persons for them have received any of said bonds, stock, or claims, (excepting as aforesaid.) And she further says, that she has received no other of the stock, bonds, coupons, and claims aforesaid, excepting only that she has, as administratrix as aforesaid, received one-tenth of the amount of first and second mortgage bonds and Yarmouth stock of said Rice, which he had in his said purchase of Reuel Williams.

SARAH HAGAR, *Adm'x.*

Answer of George F. Patten, William D. Sewall, Darius Alden, and Nathaniel M. Whitmore.

These defendants, saving, &c., for answer, say: As to the allegations in said bill that, in 1850, there existed in this State, under authority of law, a corporation known as the Kennebec and Portland Railroad Company, holding and owning a certain railroad, as set forth in said bill; that said corporation issued certificates of original stock, and preferred stock; that it also issued registered bonds, known as Yarmouth stock, and secured the same by deed of trust and mortgage; that it borrowed for the purposes stated, of certain cities, towns, and individuals, $800,000, and secured the same by deeds of trust and mortgage; that, in 1851, it issued and sold its bonds to the amount of $230,000, known as the
49 first-mortgage bonds, and secured the same by deed of trust and mortgage; that, in 1852, it secured and sold its bonds to the amount of $250,000, known as second-mortgage bonds, and secured the same by deed of trust and mortgage; that said allegations, as stated in the complainants' bill, are believed by these defendants to be substantially true, with the qualification that only a part of said road was then completed. And these defendants further say that they believe it is true that, in 1857, the said Patten, Hagar, and McKeen, trustees in the deeds of trust securing said first and second mortgage bonds, the interest on said bonds not having been paid by said corporation, in behalf of said bondholders, and by reason of the breach of the conditions of said mortgages given to secure said bonds, duly took the possession and management of said railroad, franchise, and the furniture thereof, and so continued the possession and management of the same up to January 1st, 1864, taking the income, rents, and profits, first in behalf of the second-mortgage bondholders, and after September 1st, 1860, of the first-mortgaged bondholders aforesaid. And these defendants further say that they believe it to be true, as is alleged in said bill, that, in 1861, Allen Lambard, Thomas J. Southard, Abner B. Thompson, Darius Alden, Nathaniel M. Whitmore, George F. Patten, and William D. Sewall were duly elected directors of said Kennebec Railroad Company, and so con-

tinued, as they suppose, until the present time, and that said Lambard was duly elected the president of said board and corporation. And these defendants, further answering, say that, previous to their election as directors as aforesaid, to wit, in 1857, the control and management of said railroad was taken from the hands of the directors, by the mortgage bondholders, pursuant to the statute in such case provided, and placed in the hands of the trustees under the mortgages,
50 where it has continued until the same passed to the new corporation, so that at no time since their election as aforesaid, have said directors had, nor could they rightfully have, the administration of the business or management of said road and could not be justly held accountable therefor, nor can they now be rightfully required to account for the income and profits of said road, as they have never received nor had the power to receive any portion thereof. And these defendants, further answering, say that they do not know or believe that the trustees aforesaid carelessly, negligently, or unskilfully managed said road while in their possession, nor that the net earnings thereof were $200,000 less, or any less than they should have been or could have been under faithful and proper management. And they further say that said road was, as they believe, faithfully and prudently managed by said trustees during the time it was in their possesson, and all its earnings, according to their best knowledge and belief, honestly and properly accounted for and applied as by law said trustees were required to apply the same. And these defendants, further answering, jointly and severally say, as to the allegations in said bill, to wit, that the said McKeen, Patten, and Hagar, while acting as trustees as aforesaid, and being in the possession and management of said road, combining with the defendants, the said Alden, Whitmore, Sewall, G. F. Patten, directors, and with the said R. D. Rice, John B. Brown, George F. Shepley, and Horatio N. Jose, and with other persons unknown to the complainants, contriving and intending to obtain for themselves and their associates, the possession, management, and ownership of said railroad, franchise, and rolling-stock, and to deprive the said Kennebec and Portland R. R. Company thereof, and of all hope of profit therefrom, for that purpose bought up a large
51 amount of said original, preferred, and Yarmouth stock, bonds, coupons, mortgages, and other claims which said plaintiffs were bound to pay and redeem, all amounting to $700,000 or thereabouts, for much less than their real value with money belonging to said Kennebec and Portland Railroad Company, being the earnings of said railroad, and known to be such by said persons alleged to have made such purchase, that said allegations and averments are not true. And these defendants severally say that they never had part in or knew of such combination or purchase, and that they never had part in or knew of any combination to deprive the Kennebec and Portland Railroad Company of the ownership or profit of said road, or to purchase the stock, bonds, coupons, mortgages, or claims aforesaid, with money belonging to said company, nor of any such purchase, nor have they any knowledge or belief that any of such bonds, stock, or securities were purchased by said trustees or any other persons, with the earnings of said road or the money of said complainants. As to the allegations in said bill respecting the claims held by Hon. Reuel Williams and the purchase thereof, these defendants, further answering, jointly and severally, say that they suppose it to be true that the said Williams held and owned stock, bonds, coupons, and claims secured by a mortgage on the rolling-stock of said road to a large amount, but they do not know or believe that he offered to sell and dispose of the same to the trustees aforesaid for the benefit

of said Kennebec and Portland Railroad Company for $113,000 or thereabouts. And they, further answering, jointly and severally, say that they have no knowledge or belief that said trustees, contriving and intending to obtain for themselves and their associates the ownership of said railroad, declined to accept said offer and make said purchase, nor that it was their duty, or that they had any authority or funds of said company so to do. And these defendants, further answering,
52 jointly and severally, say that they do not know or believe that said stock, bonds, coupons, and claims were afterwards purchased of said Williams by said Rice and Alden for the benefit of said trustees and their said asssociates for $113,000 or thereabouts, and paid for out of the earnings, income, and profits of said Kennebec and Portland Railroad Company, nor that said defendants in justice and good conscience ought to surrender the same to the complain'ts. But they say that the purchase of said Williams was made by the said Rice for himself and those he saw fit to associate with him therein, in the manner set forth in his answer in this case, with which they have made themselves acquainted, and which they pray may be received so far as the same is applicable as their answer on this point. And these defendants, further answering, jointly and severally, say, in response to the averments in said bill, that the said Alden, Sewall, G. F. Patten, and Whitmore, directors, combining with the said McKeen, Patten, and Hagar, trustees as aforesaid, for the purpose of becoming the owners of said railroad, in violation of their trust, neglected to pay the interest upon and redeem the bonds of said road, that said allegations are not true, and that they never knew of or had part in any such combination; that these defendants, directors, had no money of the corporation wherewith to pay said interest, and that the reason said interest was not paid was, that all the earnings of said road were required to meet the expense of operating the same, and the mortgage claims on said road standing prior to said bonds, and that said trustees applied said earnings, as these defendants believe, faithfully and properly on said prior claims, as they were by law required to do, and had no money with which to pay the interest on said bonds. As to the bill in equity, alleged to have been brought under the sanction
53 of Allen Lambard, these defendants say that a bill in equity was commenced without any consultation with, or authority asked of the directors, containing statements and aspersions which they believe to be untrue and unmerited, and the second-mortgage bondholders having foreclosed their mortgage long before the commencement of said bill, said board of directors, under the belief that there was neither the right nor the ability or desire to redeem said mortgage for the purpose of ending an unauthorized suit and preventing useless litigation, and not with any purpose of injuring the Kennebec and Portland Railroad Company or impairing or defeating any of their rights, voted to dismiss said bill, and, as these defendants are informed and believe, it was dismissed by the court, not by reason of said vote, but because it was commenced without authority.

And these defendants, further answering, say that they do not know or believe that from the time the trustees became possessed of said railroad and faanchise the same was of value sufficient, if properly administered, to have paid the interest upon the bonds, and to have redeemed the same, nor that the same should have been so applied, nor that there were earnings left after the application on prior claims to have been so applied, nor do they, or any of them, know or believe that said trustees, not regarding their trust, applied the same to purchase stock, bonds, coupons, and claims for the benefit of themselves and their said associates.

And these defendants, further answering, say they admit it to be true as alleged in said bill, that, at the time the same was commenced, there existed in this State a corporation, under the name of The Portland and Kennebec Railroad Company, organized under the laws thereof.

And they, further answering, say that they understand and believe that the same was organized in the autumn of 1862, by the organiza-
54 tion into a corporation of the holders of the second-mortgage bonds aforesaid, said mortgage having been foreclosed, and that they claim the rights secured to them under said mortgage and the proceedings adopted by virtue thereof under the statute in such case provided.

And these defendants, further answering, say that they do not know that, in 1862, or thereabouts, nor that in August, 1865, the complainants, The Kennebec and Portland Railroad Company, duly demanded of the trustees, or of The Portland and Kennebec Railroad Company, a true account in writing of the amount due on the mortgages of the first and second mortgage bonds, and of the rents, income, and profits, and money expended in repairs and improvements of said mortgaged property, nor that said trustees and said defendant corporation have unreasonably neglected or refused to render such account. But they do know that the books of said trustees and said defendant company, containing an account of the receipts and expenditures of said road, and giving a specific statement thereof, and of the amounts expended for the various purposes upon which they were required to apply the same, and furnishing all the information that could be needed by any person desiring to redeem said mortgages, if the right so to do had existed, were kept at all suitable times open for the inspection of all persons interested, and that three reports of the condition of affairs have been annually published.

And said defendants, further answering, severally say that they have no knowledge or belief that the complainants, or any person in their behalf, ever tendered to said trustees, or to the bondholders aforesaid, the amount due upon said bonds and coupons, either in 1865, or any other time.

And the said George F. Patten and Nathaniel M. Whitmore, answering to the specific interrogatory propounded to them, severally, say that they do not know that John Patten and Marshal S. Hagar, while
55 the railroad was in their hands, or under their management, as trustees aforesaid, were in any way, directly or indirectly, interested in any purchase of stock, bonds, mortgages, coupons, or claims issued by said Kennebec and Portland Railroad Company, which said road was liable to pay, nor that there was any agreement or understanding between them and the said Rice that they were to be interested in the purchase made by him of Reuel Williams, except that they heard, or understood by hearsay, that said Hagar desired to take, or was to take, an interest in said purchase, and after his decease his administratrix did take one-tenth of the bonds and Yarmouth stock thereof; and the said George F. Patten says that he conveyed to the said John Patten ten shares of the Yarmouth stock, so called, subsequent to his receiving it of said Rice, on the same terms that he received it on, but that he was under no legal obligation so to do, and there was no prior understanding or agreement between them that he should so do, and that the said John Patten has received no other portion of said Williams purchase, nor do they know that any person for said John Patten and Hagar has received any stock, bonds, coupons, or claims except as aforesaid.

And the said Alden, answering to the specific interrogatory to him propounded, says that he has no knowledge and belief that the said

Williams purchase, or its negotiation therefor, was made at the request or suggestion of the said Patten, Hagar, and McKeen, trustees as aforesaid, or either of them, or by the direction of or in behalf of the bondholders. He believes, however, that the said Hagar knew that said Rice was negotiating for said purchase, but whether said McKeen and John Patten did he cannot undertake to say. As to any direction of said bondholders to make such purchase the said Alden says that,
56 at a meeting of said bondholders after their organization, to operate said road, held at Brunswick perhaps a year prior to said purchase, he offered a motion to raise a committee to compromise said Williams claims, for which he claimed to hold a mortgage on the personal property of said railroad company, and the proposition was voted down and rejected at said meeting by said bondholders. And said Alden further says that he believes it was understood that said Hagar was to be interested in one-tenth of said purchase on certain terms, and his administratrix subsequently received said proportion of the first and second mortgage bonds and Yarmouth stock on the same terms as the other associates in said purchase, the same having been made, however, by the said Rice, and the other persons subsequently entering into an agreement with him respecting the same, as is more fully stated by said Rice in his answer to the complainants' bill aforesaid, with the contents of which said defendant has made himself acquainted, and he believes said answer to be correct and true. And said Alden further says that he has no knowledge or information that the said John Patten had any interest in, or was to have any in said Williams purchase, nor that he has received, or was to receive, or that there was any agreement or understanding that he was to have any of said stock, bonds, coupons, or claims purchased of said Williams; nor did this defendant nor the said Rice, to his knowledge, deliver or offer to deliver to said John Patten any portion of said purchase, nor to any person in his behalf.

And the said George F. Patten, Sewall, Whitmore, and Alden, in answer to the interrogatory, what amount of stocks, bonds, coupons, and claims which the complainant corporation is liable to pay they have severally purchased, of whom, and at what price, respectfully to the court beg leave to say, that all the said stock, bonds, coupons,
57 and claims which they have purchased or owned, have been purchased and paid for with their own money, and not with money of said railroad company, and as they had the right so to do, and they are not able accurately to state when, and of whom, and at what price they purchased the same, except that they received an interest in the Williams purchase of one-tenth each of the bonds and Yarmouth stock, except the said Patten, who took one-fifth, and on the same terms as the said Rice, as by their agreement of May 17, 1862, appears, a copy of which is annexed to said Rice's answer in this case.

And the said G. F. Patten says that he and the said John Patten at the early stages of the enterprise took a large amount of the original stock and preferred stock, the said John to the amount of about $36,000, and he, the said George F., about $43,000, and Yarmouth stock to the amount of fifty thousand dollars, according to his best recollection, amounting in the aggregate to about one hundred twenty-five thousand dollars, and paid the complainant company therefor at par; and that he also took of said company a large amount of the first and second mortgage bonds and paid therefor, as well as for said stock, with his own money, at the rates sold to others, which he thinks was at 85 per cent., save that he subsequently purchased at public sale, more than ten years ago, an amount of the second-mortgage bonds, that had been pledged

to Reuel Williams, and others, at a less rate. And this defendant has no recollection of having purchased any other of said stock, bonds, and mortgages said company was liable to pay. He did, however, pay for and take up, in 1855, a large amount of the coupons of the city and town bonds aforesaid, to prevent the same from being dishonored, and after holding the same for several years he recovered judgment against the Kennebec and Portland Railroad Company for the money
58 paid therefor, and sold on the execution the equity of redemption of said railroad, mortgaged as aforesaid, which said complainant corporation had, and became the purchaser thereof in , for $ (see exhibit of sale on file.) Said complainant corporation is now indebted to this defendant for several thousand dollars, advanced more than ten years ago, for the purchase of iron, according to his present recollection, which he has been unable to collect, as said corporation is now and long has been hopelessly insolvent. And the said Sewall, answering, says, that he took an amount of the original and of the preferred stock, and of the Yarmouth stock, and first and second mortgage bonds, of said complainant company, and paid it therefor, the stock at par and the bonds at the usual rates, more than ten years ago, all being paid for with his own money, the bonds at 85, except three or four thousand dollars in amount at a less rate, of those pledged to Reuel Williams, and sold by him at public sale in 1856 or '7, as he thinks. Beyond the foregoing he recollects no other purchase of any of said stock, bonds, or coupons. And the said Whitmore, answering, says that, in addition to what appears in the foregoing, he has bought bonds occasionally, as opportunity offered, some of which he holds, and some he has given to his friends, but he has always purchased the same with his own money and solely on his own account, but he is unable to state the amounts or prices paid. He now holds in his own name one hundred and three shares in the new stock, that is, of the Portland and Kennebec Railroad Company, having some time since given away a considerable amount. And the said Alden, answering, says that he has been in the practice for many years of dealing in the stock and bonds of said complainant corporation, more especially and principally in the bonds. That he has at different times purchased and sold large amounts thereof, sometimes purchasing at private sale, and sometimes at public auction,
59 but that he is now unable to state when, and of whom he bought, and to whom he sold. Since 1856, he thinks that the usual market price of the second-mortgage bonds was from 10 to 20 per cent., and of the first-mortgage bonds from 25 to 35 per cent. up to 1862. Since that time they have ranged higher. He bought as well as he could, and sold at the market price. He recollects that, during the negotiation between said Rice and Williams, aforesaid, he purchased of the agent of said Williams second-mortgage bonds aforesaid to the amount of from three to five thousand dollars, at 15 per cent. The Yarmouth stock was held at about 75 per cent., and the original and preferred stock at a mere nominal price, and for a long time there was a reluctance to be the acknowledged owner of either, owing to the fears of liability for the debts of the corporation that was hopelessly insolvent. Being unable to give a precise answer to the interrogatories prepared on this part, this defendant says that all his purchases were made with his own money, and for himself, and he respectfully submits that this is a sufficient answer. And said defendants further say that the second-mortgage bondholders have surrendered their bonds to the treasurer of the Portland and Kennebec Railroad Company, and received certificates of stock in said new corporation therefor; and further, that they have not

received from said Rice any of the old and preferred stock in the Kennebec and Portland Railroad, received by him of Mr. Williams, it not being regarded worth dividing.

(Signed) GEORGE F. PATTEN,
WILLIAM D. SEWALL,
D. ALDEN, AND
NATHANIEL M. WHITMORE.

60 *Additional answer of John Patten.*

The said John Patten makes the following amendments to his answer filed in said case, and says that upon examination he finds that he was in error in stating substantially that in a settlement with George F. Patten he received first and second mortgage bonds to the amount of two thousand dollars each, which he presumed he had of Judge Rice. This defendant finds and now says that it was Yarmouth stock, of the amount of one thousand dollars, which he received from the said George F., and that he has received from him none of said first and second mortgage bonds. When he made his former answer he was at Augusta, and had not his papers with him, and hence the mistake. And he further says that he is not able to state what he paid the said George F. for said Yarmouth stock. And this defendant further says that he is now informed and believes that it was in January, 1861, that proceedings were instituted to foreclose the first mortgage securing the first-mortgage bonds, and not 1860. And he is also informed and believes that there is a clerical error in his answer in using the name of the Portland and Kennebec Railroad Company, instead of the Kennebec and Portland Railroad Company, as the company that neglected to pay the coupons on the bonds, which error he desires also to correct.

JOHN PATTEN.

Additional answers of N. M. Whitmore and Darius Alden.

And now the said Whitmore makes this additional answer, and says that he kept no record of the purchase of any bonds of the Kennebec and Portland Railroad Company aforesaid made by him. That he purchased occasionally those bonds prior to 1861, but that he cannot
61 state accurately of whom, and the amount or price paid. And that he has no recollection of having made any purchase of said bonds since 1861, except those he had of Judge Rice, being part of his purchase of Reuel Williams. And further says that he has no recollection of having purchased any of the stock of said company since '61, although of this he cannot speak positively, as the stock was regarded as worthless, and he would not be likely to charge his mind with it.

(Signed) NATHANIEL M. WHITMORE.

And now the said Alden submits the following additional answer, and says that he and the said George F. Patten, William B. Sewall, N. M. Whitmore, R. D. Rice, George F. Shepley, John B. Brown, and Horatio N. Jose, with the other persons who held the second-mortgage bonds of said Kennebec and Portland Railroad Company, and stockholders on the Portland and Kennebec Railroad Company, that the whole number of stockholders is, as he believes, one hundred and ten or thereabouts; the bonds having been delivered to said company, and stock issued thereon and therefor.

And he further says that he and the said Whitmore were first elected

directors of the Kennebec and Portland R. R. Co., as he is informed by a statement from A. B. Thompson, who has charge of the books as clerk, and as he believes to be true, October 31st, 1861. But that at no time had said directors or the board, while he was a member thereof, the said railroad any funds thereof in their hands or subject to their control.

D. ALDEN.

Answer of George F. Shepley.

This defendant, saving, &c., for answer, says: That he admits the existence of the corporation known as the Kennebec and Portland Railroad Company in the year 1850, as alleged in the plaintiffs' 62 bill; that he has no personal knowledge in relation to the issue of original, preferred, or Yarmouth stock by said corporation, as alleged in said bill, and, if material, he requires proof of the same; that he believes it to be true that the said corporation made and executed the mortgages of its franchise and railroad substantially as set out in said bill; and that the trustees, said Patten, Hagar and McKeen, entered into possession of said railroad and franchise for breach of the condition of one of said mortgages, but of the exact date of said entry, and the length of time they remained in possession, this defendant is not advised, and prays that proof be made of the same. And this defendant has no knowledge or belief that said trustees, carelessly, negligently, or unskilfully managed said railroad and its affairs while in possession of the same, and, upon information and belief, he denies the same, and all the allegations in that clause of the complainants' bill. And this defendant denies that said McKeen, Patten, or Hagar, or said Alden, Sewall, Whitmore, and George F. Patten, or John B. Brown, Horatio N. Jose, Richard D. Rice, or any other person or persons ever combined or agreed with this defendant to purchase, or ever did purchase, to the knowledge of this defendant, with any money belonging to said company, or any earnings of said railroad, a large amount, or any amount, of original, preferred, or Yarmouth stock, bonds, coupons, mortgages, or other claims of or against said company. And this defendant utterly and specifically denies that he ever purchased, alone or jointly with others, any stock, bonds, mortgages, coupons, or claims with any funds or money belonging to said railroad company, or any earnings of said road. And this defendant has no knowledge or belief that Reuel Williams ever offered to dispose of any original, preferred, and Yarmouth stock, bonds, coupons, and 63 claims, secured by mortgage of the rolling-stock of said railroad to said McKeen, Patten, and Hagar, as trustees, for the benefit of said railroad company, for the sum of $113,000, as alleged in said bill of complaint, or for any other sum, but, on the contrary, he is fully informed, and fully believes, that said Williams never made any such offer to said trustees, and, on such information and belief, he denies the same; and he denies that, in the proper exercise of their trusts, they were bound to make any such purchase, or that they had any authority to make such purchase without specific instructions and authority from the holders of the bonds secured by said mortgage. And this defendant admits that Richard D. Rice, one of these defendants, did purchase of said Reuel Williams, upon his own credit and with his own means, and the means and credit of those associated afterwards with him in said purchase, and not with any means, moneys, earnings, or credit of said Kennebec and Portland Railroad Company, which neither then or since had any means or credit, the amount of stock, bonds, coupons,

and claims set forth and particularly described in the answer of said Rice to the bill of complaint in this case, for a more particular description of which this defendant prays leave to refer to the answer of said Rice to that part of the complainants' bill, and to adopt the same as part of this, (his answer,) as well as the statements of said Rice in his answer as to the terms and conditions of such purchase; and this defendant subsequently became interested to the amount of one-tenth part in said purchase of said Williams, (as he had previously agreed with said Rice to do,) without any knowledge, until some time after, who the other parties were to be interested in said purchase, except John B. Brown and Darius Alden; that he settled with said Rice for his tenth part of the advances made by said Rice out of his own
64 proper earnings and money, and not with any earnings or money of said railroad company, which was then and is now largely indebted to this defendant for services and advances, and never had any funds or earnings in his hands. And this defendant, further answering, says that the stock, bonds, coupons, and claims aforesaid, fully described and set forth in the answer of said Rice, to which he refers, are the only stock, bonds, coupons, or claims referred to in said bill, or connected with the subject-matter of said bill, in which he has or ever had any interest; that he has a small amount of other first-mortgage bonds, so called, which have no connection with the subject-matter of said bill, which he bought in open market of brokers and paid for at different rates, from the face to a discount, more or less, according to the market prices, but he is unable to state, having no account or memoranda to refresh his recollection of the several amounts paid, or of the exact number of his purchases or sales of such stock, and never knew the parties of whom he bought or to whom he sold said stock, having generally bought or sold through a stock-broker or brokers. Subsequently to the purchase of said Rice and others of said Williams of said stock, bonds, and coupons, and other claims, said trustees, (in obedience to the instructions of the bondholders, at a meeting of said bondholders held after the purchase by said Rice, for the purpose of instructing said trustees in reference to negotiations with said Rice for a purchase from said Rice of some portion of the property he had previously purchased of said Williams,) did enter into an agreement with said Rice to purchase of him the city and town coupons, and the claim of said Williams, secured by a mortgage of rolling-stock and personal property, for the sum of one hundred and ten thousand dollars, which sum this defendant has been informed and believes was paid from the earnings of the road. And this defendant, having
65 previously thoroughly examined into the validity of said claims and the sufficiency, security, and the validity of the mortgage and mortgage security for said coupons and claims, then believed and knew, and now believes and states that this purchase by said trustees was an advantageous purchase for said company and said bondholders; and this defendant at the time was ready and willing to purchase, and, in behalf of himself and others, offered to purchase of said Rice the same property sold by him to said trustees, and pay therefor a much larger sum than that for which they were sold to the trustees.

But said Rice declined the offer, preferring that the bondholders and the company should have the benefit of said purchase. And this defendant, upon information and belief, denies that the complainants ever demanded an account in writing of the sum due on said mortgages, and of the rents, profits, and income of the same, or that the said trustees ever refused to render such an account, and he expressly denies that

any such tender as is averred in said bill, or any tender of the amount due upon said bonds and coupons was ever made by said complainants at any time, to any person or persons or corporations whatever. And this defendant denies all unlawful combination and confederacy in the said bill charged, without this, that there is any other matter or thing in the said bill contained material or necessary for this defendant to make answer unto and not herein and hereby well and sufficiently answered, confessed, traversed and avoided, or denied, is true, to the knowledge or belief of this defendant. All which matters and things this defendant is ready to aver, maintain, and prove as this honorable court shall direct; and prays to be hence dismissed with his reasonable costs and charges in this behalf most wrongfully sustained.

G. F. SHEPLEY.

SHEPLEY & STROUT,
Solicitors for Defendant.

66 *Answer of John B. Brown.*

This defendant, saving, &c., for answer, says: That he admits the existence of the corporation known as the Kennebec and Portland Railroad Company, in the year 1850, as alleged in the plaintiff's bill. That he has no personal knowledge in relation to the issues of original, preferred, or Yarmouth stock by said corporation as alleged in said bill, and, if material, he requires proof of the same. That he believes it to be true that the said corporation made and executed the mortgages of its franchises and railroad substantially as set out in said bill, and that the trustees, said Patten, Hagar, and McKeen, entered into possession of said railroad and franchises for breech of the condition of one of said mortgages, but of the exact date of said entry and the length of time they remained in possession, this defendant is not advised, and prays that proof be made of the same. And this defendant has no knowledge or belief that said trustees carelessly, negligently, or unskilfully managed said railroad and its affairs while in possession of the same, and, upon information and belief, he denies the same, and all the allegations in that clause of the complainants' bill. And this defendant denies that said McKeen, Patten, or Hagar, or said Alden, Sewall, Whitmore and George F. Patten, or George F. Shepley, Horatio N. Jose, Richard D. Rice, or any other person or persons ever combined or agreed with this defendant to purchase, or ever did purchase, to the knowledge of this defendant, with any money belonging to said company, or any earnings of said railroad, a large amount or any amount of original, preferred, or Yarmouth stock, bonds, coupons, mortgages or other claims of or against said company, and this defendant utterly and specifically denies that he ever purchased, alone or jointly with others, any stock,

bonds, mortgages, coupons or claims, with any funds or money
67 belonging to said railroad company or any earnings of said road.

And this defendant has no knowledge or belief that Reuel Williams ever offered to dispose of any original, preferred, and Yarmouth stock, bonds, coupons, and claims secured by mortgage of the rolling-stock of said railroad to said McKeen, Patten, and Hagar, as trustees, for the benefit of said railroad company, for the sum of $113,000, as alleged in said bill of complaint, or for any other sum; but, on the contrary, he is fully informed and fully believes that said Williams never made any such offer to said trustees, and, on such information and belief, he denies the same, and he denies that, in the proper exercise of their trusts, they were bound to make any such purchase, or that they had

any authority to make such purchase without specific instructions and authority from the holders of the bonds secured by said mortgages. And this defendant admits that Richard D. Rice, one of these defendants, did purchase of said Reuel Williams, upon his own credit and with his own means and the means and credit of those associated afterwards with him in said purchase, and not with any means, moneys, earnings, or credits of said Kennebec and Portland Railroad Company, which neither then or since had any means or credit, the amount of stock, bonds, coupons, and claims set forth and particularly described in the answer of said Rice to the bill of complaint in this case, for a more particular description of which this defendant prays leave to refer to the answer of said Rice to that part of complainant's bill, and to adopt the same as part of this, (his answer,) as well as the statement of said Rice in his answer as to the terms and conditions of such purchase; and this defendant subsequently became interested to the amount of one-tenth part in said purchase of said Williams, as he had previously agreed with said Rice to do, without any knowledge until some time
68 after who the other parties were to be interested in said purchase, except George F. Shepley and Darius Alden. That he settled with said Rice for his tenth part of the advances made by said Rice, out of his own proper earnings and money and not with any earnings or money of said railroad company. And this defendant, at or about the same time, disposed of one-fourth part of his one-tenth part of said purchase to Horatio N. Jose upon the same terms and conditions as the original purchase of said Williams. And this defendant, further answering, says that the stock, bonds, coupons, and claims aforesaid, fully described and set forth in the answer of said Rice, to which he refers, are the only stock, bonds, coupons, or claims (referred to in said bill) or connected with the subject-matter of said bill, in which he has or ever had any interest. That he has a small amount of other first-mortgage bonds, so called, which have no connection with the subject-matter of said bill, which he bought in open market of brokers and paid for at different rates from the face to a discount more or less according to the market prices, but he is unable to state, having no account or memoranda to refresh his recollection, of the several amounts paid, or of the exact number of his purchases *or* sales of such stock. Subsequently to the purchase by said Rice and others, of said Williams of said stock, bonds and coupons, and other claims, said trustees, (in obedience to the instructions of the bondholders, at a meeting of said bondholders held after the purchase by said Rice, for the purpose of instructing said trustees in reference to negotiations with said Rice for a purchase from said Rice of some portion of the property he had previously purchased of said Williams,) did enter into an agreement with said Rice to purchase of him the city and town coupons, and the claims of said Wil-
liams, secured by a mortgage of rolling-stock, and preferred
69 property for the sum of $110,000, which sum this defendant has been informed and believes was paid from the earnings of the road. And this defendant then believed and now believes and states that this purchase by said trustees was an advantageous purchase for said company and said bondholders, and this defendant at the time was ready and willing to purchase, and, in behalf of himself and others, offered to purchase of said Rice the same property sold by him to said trustees and pay therefor a much larger sum than that for which they were sold to the trustees. But said Rice declined the offer, preferring that the bondholders and the company should have the benefit of said purchase. And this defendant, upon information and belief, denies that

the complainants ever demanded an account in writing of the sum due on said mortgages, and of the rents, profits and income of the same, or that the said trustees ever refused to render such an account, and he expressly denies that any such tender as is averred in said bill, or any tender of the amount due upon said bonds and coupons, was ever made by said complainants at any time, to any person or persons or corporations whatever. And this defendant denies all and all manner of unlawful combination and confederacy wherewith he is by the said bill charged, without this, that there is any other matter or thing in said complainants' bill of complaint contained, material or necessary for this defendant to make answer unto and not herein and hereby well and sufficiently answered, confessed, traversed and avoided or denied, is true, to the knowledge or belief of this defendant. All which matters and things this defendant is ready and willing to aver, maintain, and prove, as this honorable court shall direct; and humbly prays to be hence dismissed with his reasonable costs and charges in this behalf most wrongfully sustained.

J. B. BROWN.

70 *Answer of Horatio N. Jose.*

This defendant, saving, &c., for answer, says: That he admits the existence of the corporation known as the Kennebec and Portland Railroad Company, in the year 1850, as alleged in the plaintiffs' bill. That he has no personal knowledge in relation to the issue of original, preferred, or Yarmouth stock, by said corporation as alleged in said bill, and, if material, he requires proof of the same. That he believes it to be true that the said corporation made and executed the mortgages of its franchise and railroad substantially as set out in said bill, and that the trustees, said Patten, Hagar, and McKeen, entered into possession of said railroad and franchise for breach of the condition of one of said mortgages, but of the exact date of said entry and the length of time they remained in possession this defendant is not advised, and prays that proof be made of the same. And this defendant has no knowledge or belief that said trustees carelessly, negligently, or unskilfully managed said railroad and its affairs while in possession of the same, and, upon information and belief, he denies the same and all the allegations in that clause of the complainants' bill. And this defendant denies that said McKeen, Patten, or Hagar, or said Alden, Sewall, Whitmore, and George F. Patten, or John B. Brown, George F. Shepley, Richard D. Rice, or any other person or persons ever combined or agreed with this defendant to purchase, or ever did purchase, to the knowledge of this defendant, with any means belonging to said company, or any earnings of said railroad, a large amount or any amount of original, preferred, or Yarmouth stocks, bonds, coupons, mortgages, or other claims of or against said company; and this defendant utterly and specifically denies that he

71 ever purchased, alone or jointly with others, any stock, bonds, mortgages, coupons, or claims with any funds or money belonging to said railroad company, or any earnings of said road. And this defendant has no knowledge or belief that Reuel Williams ever offered to dispose of any original, preferred, and Yarmouth stock, bonds, coupons, and claims secured by mortgage of the rolling-stock of said railroad, to said McKeen, Patten, and Hagar, as trustees, for the benefit of said railroad company, for the sum of $113,000, as alleged in said bill of complaint, or for any other sum; but, on the contrary, he is fully informed and fully believes that said Williams never made any such offer to said

trustees, and, on such information and belief, he denies the same, and he denies that, in the proper exercise of their trusts, they were bound to make any such purchase or that they had any authority to make such purchase without specific instructions and authority from the holders of the bonds secured by said mortgages. And this defendant admits that Richard D. Rice, one of these defendants, did purchase of said Reuel Williams, upon his own credit and with his own means, and with the means and credit of those associated afterwards with him in said purchase, and not with any means, moneys, earnings, or credits of said Kennebec and Portland Railroad Company, which neither then or since had any means or credit, the amount of stock, bonds, coupons and claim set forth and particularly described in the answer of said Rice to the bill of complaint in this case, for a more particular description of which this defendant prays leave to refer to the answer of said Rice, to that part of the complainants' bill, and to adopt the same as part of this, his answer, as well as the statement of said Rice in his answer as to the terms and conditions of such purchase, and this defendant subsequently became interested to the amount of one-fourth of one-tenth part in said pur-
72 chase of said Williams, as he had previously agreed to do, without any knowledge until some time after who the other parties were to be interested in said purchase, except John B. Brown, George F. Shepley, and Darius Alden. That he settled for his one-fourth of one-tenth part of the advances made by said Rice, out of his own proper earnings and money, and not with any earnings or money of said railroad company. And this defendant, further answering, says, that the stock, bonds, coupons, and claims aforesaid, fully described and set forth in the answer of said Rice, to which he refers, are the only stock, bonds, coupons, or claims referred to in said bill, or connected with the subject-matter of said bill, in which he has or ever had any interest. That he has a small amount of other first-mortgage bonds, so called, which have no connection with the subject-matter of said bill, which he bought in open market of brokers and paid for at different rates from the face to discount more or less according to the market prices, but he is unable to state, having no account or memoranda to refresh his recollection, of the several amounts paid or of the exact number of his purchases or sales of such stock. Subsequently to the purchase by said Rice and others of said Williams of said stock, bonds, and coupons, and other claims, said trustees, (in obedience to the instructions of the bondholders, at a meeting of said bondholders held after the purchase by said Rice for the purpose of instructing said trustees in reference to negotiations with said Rice for a purchase from said Rice of some portion of the property he had previously purchased of said Williams,) did enter into an agreement with said Rice to purchase of him the city and town coupons and the claim of said Williams secured by a mortgage of rolling-stock, and personal property for the sum of $110,000, which sum the defendant has been informed and believes was paid from the earnings of the
73 road. And this defendant then believed and now believes and states that this purchase by said trustees was an advantageous purchase for said company and said bondholders. And this defendant, upon information and belief, denies that the complainants ever demanded an account in writing of the sum due on said mortgages and the rents, profits, and income of the same, or that the said trustees ever refused to render such an account, and he expressly denies that any such tender as is averred in said bill, or any tender of the amount due upon said bonds and coupons was ever made by said complainants at any time to any person or persons or corporations whatever. And this defendant

denies all unlawful combination and confederacy wherewith he is by the said bill charged, without this, that there is any other matter or thing in the said complainants' bill of complaint, material or necessary for this defendant to make answer unto, and not herein and hereby well and sufficiently answered, confessed, traversed and avoided, or denied, is true, to the knowledge or belief of this defendant. All which matters and things this defendant is ready and willing to aver, maintain, and prove, as this honorable court shall direct; and humbly prays to be hence dismissed with his reasonable costs and charges in this behalf most wrongfully sustained.

HORATIO N. JOSE.

First mortgage.

Know all men by these presents that The Kennebec and Portland Railroad Company, a corporation existing under the laws of the State of Maine, and doing business therein, in consideration of the sum of two hundred and thirty thousand dollars, to said corporation paid by John Patten, of Bath, and Marshal S. Hager, of Richmond, in the county of Lincoln, and Joseph McKeen, of Brunswick, in the county of
74 Cumberland, esquires, as trustees for the holders of bonds issued by said Kennebec and Portland Railroad Company, in pursuance of their vote passed on the second day of October, instant, (the receipt of which sum, the consideration hereof, is hereby acknowledged,) have granted, sold, and conveyed, and by these presents do grant, sell, and convey to said Patten, Hagar, and McKeen, in trust as aforesaid, all their railroad, made and to be made, from the station in Portland to the station in Augusta, including both, and the branch to Bath, and all their corporate property, real and personal, and the franchise of said company, including the road-bed and superstructure, as located by their engineers, whether conveyed by deed or obtained by payment of damages, and all the several lots and parcels of land heretofore conveyed to said corporation for depot lots or otherwise, and the buildings thereon now belonging to said company, for a description of which, reference is to be had to the respective deeds thereof, as recorded in the several counties where the said lands are situated, and the personal property, consisting of about five hundred tons of railroad iron, procured for the road, but not yet laid thereon, six locomotive engines and tenders, called the Bath, Brunswick, Richmond, Augusta, Maine, and Kennebec, respectively, six passenger cars, six platform cars, and twenty-nine gravel cars, with their appurtenances, subject, however, to a lien already created on that portion of the said railroad lying between Portland and the junction in Yarmouth, and also subject to a mortgage of the whole property above described, as heretofore executed to the commissioners of the sinking fund, so called, and to the trustees of the holders of forty-five thousand dollars of the bonds of said company, heretofore issued, as by reference thereto will fully appear: To have and to hold said premises and personal property, subject to said prior incumbrances
75 to the said Patten, Hagar, and McKeen, and the survivors or survivor of them, in trust only, for the use and benefit of the holder and holders, for the time being, of certain bonds of said corporation, amounting, in the whole, to the sum of two hundred and thirty thousand dollars, made and issued pursuant to their vote of the second instant, and dated 15th October, 1851, and payable on 15th October, 1861, with interest semi-annually, in sums of one thousand, five hundred, two hundred, and one hundred dollars each, and signed by the

president and treasurer of said corporation, with a certificate thereon, under the hands of said Patten, Hagar, and McKeen, that they are secured by this mortgage in the proportions in which the several holders thereof may have of the whole sum secured hereby. Provided, nevertheless, that if said corporation shall well and truly pay the coupons, for the semi-annual interest of said bonds, and the principal sums of said bonds as they may fall due and payable, then this deed to be void; otherwise to remain in full force.

In testimony whereof the said Kennebec and Portland Railroad Company hereunto set their corporate seal, and the president subscribes his name, pursuant to the vote aforesaid, this seventeenth day of October, A. D. 1851.

(Signed) REUEL WILLIAMS, *President.* [L. S.]

Signed, sealed, and delivered in presence of—
T. S. McLELLAN, and
JOHN S. CUSHING.

CUMBERLAND, *ss:*

OCTOBER 17TH, 1851.

Personally appeared the aboved-named Reuel Williams, as president, and acknowledged the foregoing to be the free act and deed of the Kennebec and Portland Railroad Company.

Before me—

T. S. McLELLAN,
Justice of the Peace.

KENNEBEC, *ss:*

Received October 31st, 1851, at 9 o'clock a. m. Entered and compared with the original.

By A. STARKS, *Register.*

76 *Second mortgage.*

Know all men by these presents that The Kennebec and Portland Railroad Company, in consideration of two hundred and fifty thousand dollars, to them paid by John Patten, of Bath, Joseph McKeen, of Brunswick, and Marshal S. Hagar, of Richmond, as trustees, appointed by the stockholders in said company at their annual meeting, held on the 7th instant, to take and hold security for the bondholders of the bonds of said company, then authorized to be issued, the receipt whereof is acknowledged, do hereby grant, sell, and convey to the said Patten, McKeen, and Hagar, as trustees, and to their successors in that trust, all their railroad as now made from Portland to Augusta, and from Brunswick to Bath, inclusive, and all their corporate property, real and personal, and the franchise of said company, including the road and superstructure, and all the land conveyed to said company by others, for a description of which reference is to be had to the several deeds recorded in Cumberland, Lincoln, and Kennebec, as well as the right of way paid for, and all the buildings thereon, and the personal property, consisting of engines and tenders, passengers, freight, platform, and dirt cars, snow-ploughs, and apparatus of every description, subject however, to prior mortages thereon: To have and to hold the same to the said Patten, McKeen, and Hagar, as trustees aforesaid, and to their successors in that trust, for the sole benefit of the persons who are or

may be holders of the bonds of said company, issued and to be issued, pursuant to said vote of the stockholders, in the proportion in which persons may hold the same. Provided, however, that if said railroad company shall well and promptly pay semi-annually the interest on their bonds dated October 15th, 1852, issued pursuant to the vote of the
77 stockholders, amounting in all to two hundred and fifty thousand dollars, and each bond having thereon the certificate of said trustees that the payment of it is secured by the mortgage, and shall also pay the principal of said bonds when due, then this deed to be void; otherwise to remain in full force.

In testimony whereof the said railroad company, by Reuel Williams, their president, duly authorized for the purpose, hereunto set their hand and corporate seal, the fifteenth day of October, A. D. 1852.

REUEL WILLIAMS, *President.* [L. S.]

Countersigned:

A. H. GILMAN, *Treasurer.*

Signed, sealed, and delivered in the presence of—
EBEN FULLER, and
J. A. GILMAN.

KENNEBEC, *ss:*

OCTOBER 16TH, 1852.

Then the above Reuel Williams acknowledged the foregoing to be the free act and deed of the Kennebec and Portland Railroad Company.
Before me,

EBEN FULLER,
Justice of the Peace.

KENNEBEC, *ss:*

Received November 2, 9½ o'clock a. m., 1852. Entered and compared with the original.

By A. STARKS, *Register.*

Vote authorizing first mortgage.

At a meeting of the stockholders of the Kennebec and Portland Railroad Company, held at Richmond, October 2, 1851, it was voted: That, to procure additional means for the completion of the road, erecting station and engine houses, procuring additional furniture, &c., the directors be authorized to make a loan not exceeding two hundred and thirty thousand dollars, payable in ten years, with interest semi-annually, and to issue bonds therefor, signed by the president and treasurer, and payable to bearer, in such sums as may be most convenient; and, to secure the payment thereof, the president is hereby
78 authorized to make and execute, in behalf of the corporation, a mortgage deed to trustees for the use and benefit of all the holders of such bonds in the proportion which each may hold thereof, of all our railroad between the stations at Portland and Augusta, including the stations at both places and the branch to Bath, and of all lands and buildings belonging to the corporation, the franchise and furniture on the road, subject to the prior mortgage of a part to the trustees of the contributors for building the road from Yarmouth to Portland, and to the mortgage of nineteen-twentieths of the whole to the commissioners of the sinking fund, and of the other one-twentieth to the trustees of the holders of $45,000, in bonds of the company, issued on the 10th of December, 1850, and payable in twenty years with in-

terest semi annually, and the treasurer is authorized to sell such bonds at such prices as can be obtained for the same, not less than ninety cents on the dollar.

Vote authorizing second mortgage.

At a meeting of the stockholders of the Kennebec and Portland Railroad Company, held at Augusta, October 7th, 1852, it was voted: That the treasurer, under the direction of the directors, be authorized to make and issue two hundred and fifty thousand dollars in bonds of the company, payable in twelve years, with interest payable semi-annually, and the proceeds to be applied to the settlement of bonds issued in 1848, and for the payment of existing claims against the company, and that the president be authorized to execute a mortgage of the road and appurtenances, subject to prior mortgages, to secure said bonds.

79 *An act to incorporate the Kennebec and Portland Railroad Company.*

SECTION 1. *Be it enacted by the senate and house of representatives in legislature assembled*, That Rob't H. Gardiner, O. B. Dorrance, F. Allen, M. Greenwood, A. Berry, N. F. Deering, P. Sheldon, M. P. Sawyer, Henry Bowman, William Stevens, 2d, J. P. Boyd, F. Tinkham, John Henry, E. Swan, John Otis, Reuel Williams, A. Redington, E. F. Deane, G. Evans, H. B. Hoskins, A. J. Stone, R. K. Page, S. H. Mudge, A. Shaw, S. E. Crocker, E. McLellan, Francis Richards, M. Springer, William Palmer, Allen Lambard, R. H. Gardiner, jr., E. C. Stevens, James L. Child, T. W. Smith, S. Kingsbery, A. S. Chadwick, R. Boyd, M. French, Nathaniel Kimball, Hiram Stevens, Alexander Cooper, Martin Gore, Stephen Young, H. Goddard, D. Scribner, J. C. Humphreys, D. Dunlap, David Neal, Josiah Merrow, their associates, successors, and assigns, be, and they hereby are, made a body politic and corporate by the name of The Kennebec and Portland Railroad Company, and by that name shall have and enjoy all the rights, privileges, and immunities incident to corporations, and subject to the liaib'lities and duties provided for by an "Act concerning corporations," passed February sixteenth, one thousand eight hundred and thirty-six, so far as the same is made applicable to railroads heretofore incorporated, and also subject to the duties and liabilities, and entitled to all the rights, privileges, and immunities provided for in the "Act defining the rights and duties of railroad corporations," passed March first, one thousand eight hundred and thirty-six; and also shall have the power to ordain and establish such by-laws as shall from time to time be deemed necessary and proper for the management and regulation of their
80 affairs, not repugnant to the laws of this State; and said company are hereby authorized and empowered to locate, construct, and maintain a railroad, commencing at a point in the city of Portland, and thence passing through the towns of North Yarmouth, Freeport, Brunswick village and Topsham, to Gardiner village, and thence to Hallowell village, and thence to Augusta village, on the west side of Kennebec River.

SECTION 2. *Be it further enacted*, That the powers of said company, except at the legal meetings thereof, shall be vested in a board of not less than nine directors, who shall be chosen at the first meeting of said company, and afterwards annually at such time as the by-laws of the company shall prescribe, and shall hold their offices for one year and until others shall be chosen in their stead; and said directors shall an-

nually elect from their own body a president, secretary, treasurer, and such other officers as said by-laws shall direct, and shall have power to employ and invest the proceeds of the railroad as they may see fit, for the use and benefit of the stockholders.

SECT. 3. *Be it further enacted*, That this grant shall be void unless the route of said railroad shall be surveyed and a return of said survey be made to the county commissioners of the counties through which said railroad shall pass, and to the governor and council, on or before the first day of August, one thousand eight hundred and thirty-seven, and the stock taken up within two years thereafter, and at least that part of said route between Portland and Brunswick be completed and in operation within six years from the said first day of August, one thousand eight hundred and thirty-seven, and the whole route within ten years therefrom.

SECT. 4. *Be it further enacted*, That the capital stock of said company may consist of one million two hundred thousand dollars, and shall be divided into shares of two hundred dollars, and each share shall
81 be entitled to one vote by the person holding such share or shares, or by authorizing some person in writing to vote and act as his proxy; but no member shall be allowed more than fifty votes.

SECT. 5. *Be it further enacted*, That said company may from time to time establish, demand, and collect such tolls for the transportation of persons, goods, wares, merchandise or [any] commodity whatever on said railroad as they may see fit: *Provided*, That whenever the profits arising from tolls or otherwise shall exceed twelve per centum per annum on the actual cost of said railroad, after deducting all necessary disbursements in conducting its operations, then the legislature shall, from time to time, have the right so to reduce such tolls as may have been established, not below the rate of twelve per centum per annum, as aforesaid as may be judged expedient. And, to carry this provision into effect, it shall be the duty of said company, within one year after said railroad shall have been put in operation, or any part thereof, to make return to the governor and council of the actual cost of said railroad, or part thereof, and annually thereafter, of all disbursements made and allowed by the directors, and the rates of toll by them established, the amount of tolls and other profits received, and the rate of profits or per centum on the cost aforesaid, actually realized within the year; and if the legislature shall not be satisfied with such return the legislature may require an examination into the affairs of said company in such manner as they shall direct; and if it shall appear that the affairs of said company have not been economically conducted, and that the profits arising from tolls or otherwise might have exceeded the maximum of twelve per centum per annum, or that any willful evasion of the provisions of this section shall have been practiced by said company,
82 then the legislature shall have the right to make such reasonable reduction of the charges for disbursements, as aforesaid, allowed and charged by said directors as shall be judged economical, and from such basis so to reduce the tolls and profits, not, however, below the rate of twelve per centum per annum as aforesaid, as shall be judged expedient, anything in this act to the contrary notwithstanding: *And provided further*, That the legislature shall not so reduce said tolls and profits below the rates, nor on any principle more unfavorable to said company than the mode adopted in the charter of the Maine, New Hampshire, and Massachusetts Railroad Corporation, and making the same reservation in aid of primary schools in this charter as is reserved in that.

SECT. 6. *Be it further enacted*, That it shall be the duty of said com-

pany to provide and maintain on their railroad suitable and convenient cars for the transportation of persons and freight of every description to be transported thereon; and may purchase, take, and hold such land and other property, may establish such depots, warehouses, and other works as may be necessary for the safe-keeping and accommodation of persons, goods, wares, and merchandise transported or to be transported thereon, as may be found expedient for the construction and use of said railroad and other works, and shall have a lien for tolls due on all property of every description by them transported from place to place, with the right to sell so much thereof as may be necessary to pay the same, with incidental charges, and may make and collect such assessments on the shares of said capital stock as may be deemed expedient, in such manner as shall be prescribed in their by-laws.

SECTION 7. *Be it further enacted*, That it shall be the duty of said company to receive from any other railroad established by authority of this State connected with or approaching near to any portion of
83 the road established by this company, at any suitable and convenient point, any person or freight, and transport the same to any other point on said railroad where persons or freight may be safely and conveniently landed, agreeably to the wishes of such person or the owner of such freight, on the payment or offer of payment of the same rate of tolls established by said company for the same portion of their said railroad traversed by such person or freight: *Provided*, That said railroad company connecting with or approaching this line of railroad be required in like manner to transport persons and freight on their railroad arriving from this: *And provided also*, That from the city of Portland the said company shall have authority to connect thence with any other railroad established by law leading to Boston, in Massachusetts, in the most direct and feasible manner, and so as best to accommodate the travelling public, and consent of the proprietors thereof being first obtained, such connection to be made in such manner as shall be designated by the engineer employed by the said company to survey and construct their said railroad and the engineer employed to survey and construct such other railroad.

SECTION 8. *Be it further enacted*, That if any person shall willfully or wantonly obstruct the passage of any carriage on said railroad, or in way injure or destroy said railroad, or any part thereof, or anything belonging thereto, or any material or implement to be employed in the construction or for the use of said railroad, he, she, or they, or any person or persons assisting, aiding, or abetting such trespass, or committing, or in aiding or assisting in the commission of any other trespass on said railroad or anything connected therewith, shall forfeit and pay to the use of said company treble damages by them sustained, to be sued for and recovered in an action of debt or of the case by
84 such persons or officers as the directors shall from time to time appoint, before any court of competent jurisdiction. And such offender or offenders shall be liable to indictment by the grand jury of the county within which such trespass shall have been committed, for any offence or offences done in violation of the above provisions, and, on conviction thereof before any court competent to try the same, shall pay a fine not exceeding one hundred dollars to the use of the State, or be imprisoned for a time not exceeding one year, either or both, at the discretion of the court before whom such conviction may be had.

SECT. 9. *Be it further enacted*, That the provisions of an "Act concerning corporations," passed March seventeenth, one thousand eight

hundred and thirty-one, shall not extend or apply to the company hereby incorporated.

SECT. 10. *Be it further enacted*, That the first meeting of the company may be called at Brunswick by the three persons first named in the first section of this act, by publishing the notice of such meeting three weeks successively in one or more of the newspapers published at Augusta, Gardiner, Brunswick, and Portland, the last publication to be at least ten days before the time appointed for such meeting.

SECT. 11. *Be it further enacted*, That it shall be the duty of said company to transport the United States mail on their railroad for a reasonable compensation, if required so to do by the Postmaster General; and if the Postmaster General and the directors of said company cannot agree on the compensation to be allowed by the Post Office Department to said company for such service, then the legislature may require said company to transport said mail for such compensation, not less than the actual expense incurred by said company in the transportation thereof as the legislature may judge reasonable and proper: *Provided*, the Postmaster General shall accede thereto.

85 SECT. 12. *Be it further enacted*, That the portion of this railroad route from Gardiner village to Augusta village, through Hallowell, shall be made and completed within one year from the time that the railroad and works thereon from the village of Gardiner to the city of Portland shall have been completed and put in operation; the route and termini to be designated by some skillful and experienced engineer to be employed by said company to make their survey, in the most practicable manner, having due regard to the accommodation of the public and the interests of said company: *Provided*, that if such extension in the manner, and time aforesaid, in the opinion of said engineer, shall require an extension of their capital stock, then a further time of one year shall be allowed to said company so to complete said route. But no construction shall be given to the provisions of this act which shall tend to exonerate or prevent said company from the duty or right of connecting the village of Augusta, through Hallowell as aforesaid, in the most commodious manner, with the railroad from Gardiner village to the city of Portland: *And provided further*, that if any other railroad shall be granted by the legislature, and its construction commenced before the time allowed to the corporation by this act to complete the same either between Portland and Augusta, or Gardiner and Augusta, so as to divert travel from this road, then this corporation shall not be required to complete the section between Gardiner and Augusta.

Approved April 1, 1836.

An act to extend the time to locate and construct the Kennebec and Portland Railroad.

Be it enacted by the senate and house of representatives in legislature assembled, That the time specified in the third section of the act granting the charter to the Kennebec and Portland Railroad Com-

86 pany, for the survey to be made and a return of the same, be, and the same is hereby, extended five years, and the time for the stock to be taken up to six years, and the time for the completion of the whole road to ten years from the day this act shall be approved by the governor; and all parts of the act to which this refers, inconsistent with the provisions of this act, be, and the same are hereby, repealed.

Approved April 9, 1841.

An act in addition to the act incorporating the Kennebec and Portland Railroad Company.

Be it enacted by the senate and house of representatives in legislature assembled, as follows:

SECT. 1. That the time now allowed by law to the Kennebec and Portland Railroad Company to complete the survey and make return of the same, is hereby extended five years, and the time for the stock to be taken up, to six years, and the time for the completion of the whole road, to ten years from the day this act shall be approved by the governor.

SECT. 2. If said railroad shall, in the course thereof, cross any tide-waters, navigable rivers, or streams, the said corporation are hereby authorized and empowered to erect for the sole and exclusive travel on their said railroad, a bridge or causeway, across each of said rivers or streams, or across any such tide-waters: *Provided*, said bridge or bridges, or causeways shall be so constructed as not to obstruct or impede the navigation of said waters.

SECT. 3. All real estate, purchased by said corporation, for the use of the same, under the sixth section of the act to which this is in addition, shall be taxable to said corporation by the several towns, cities, and plantations in which said lands may lie, in the same manner as lands owned by private persons, and shall in the valuation list be estimated the same as other real estate of the same quality, in such town, 87 city, or plantation, and not otherwise; and the shares owned by the respective stockholders shall be deemed personal estate, and be taxable as such to the owners thereof, in the places where they reside and have their home. And whenever the net income of said corporation shall have amounted to ten per centum per annum upon the cost of the road and its appendages and incidental expenses, the directors shall make a special report of the fact to the legislature; from and after which time, one moiety, or such other portion as the legislature may from time to time determine, of the net income from said road, accruing thereafter, over and above ten per centum per annum first to be paid to the stockholders, shall annually be paid over by the treasurer of said corporation as a tax into the treasury of the State for the use of the State. And the State may have and maintain an action against said corporation to recover the same. But no other tax than herein is provided shall ever be levied or assessed on said corporation, or any of their privileges or franchises.

SECT. 4. Said corporation shall have power to connect their road with any other railroad, at such point as may be most convenient on the route established by the act to which this act is in addition.

SECT. 5. The first meeting of this company shall be held in the town of Gardiner; and any three of the persons named in the act of incorporation are hereby authorized to call the first meeting of said corporation, by giving notice in one or more newspapers published in the town of Augusta and the city of Portland of the time and place, and the purposes of such meeting, at least twenty days before the time mentioned in such notice.

SECT. 6. All acts and parts relating to the Kennebec and Portland Railroad Company, inconsistent with the provisions of this act, are hereby repealed.

Approved March 31, 1845.

88 *An act in addition to the act incorporating the Kennebec and Portland Railroad Company.*

Be it enacted by the senate and house of representatives in legislature assembled, as follows:

SECT. 1. The Kennebec and Portland Railroad Company is authorized and empowered to locate their road through and east of the village of Brunswick, and to extend the same to tide-waters in the village of Bath, by a branch of their road or otherwise; and that part of the road or branch between Brunswick and Bath shall be completed simultaneously with the part of the road between Portland and Brunswick.

SECT. 2. The capital stock of said company shall be divided into shares of one hundred dollars each, instead of two hundred dollars as is provided in the act to which this is in addition.

SECT. 3. The said company shall have the same power to construct bridges and causeways across tide-waters in the route of said road and branch, and with the same conditions and restrictions as are granted to the Bath and Portland Railroad Company by the fifteenth section of the act incorporating said company.

SECT. 4. The said company shall have power to complete any section of their road commencing at Portland and proceeding east, and to take passengers and freight before the whole of the road is built, and to charge therefor in the proportion that the distance run bears to the whole length of the road, as provided for in the bill to which this bill is in addition.

SECT. 5. The doings of said corporation at their first meeting, called under the act establishing the same, and at the several adjournments thereof, and in calling said first meeting, are hereby made valid in law, and said corporation may, at any subsequent adjournment, elect,
89 in the manner prescribed by law, all the officers provided for by said act, first giving ten days' notice of an intention so to do in some newspaper printed in each of the cities of Boston and Portland, and in each of the towns of Bath, Gardiner, Hallowell, and Augusta.

Approved July 16, 1846.

Extract from chap. 81 *of Revised Statutes.*

SECT. 2. Any railroad corporation may take and hold, under the provisions contained in this chapter, so much real estate as may be necessary for the location, construction, and convenient use of their road. Such corporation may also take, remove, and use, for the construction and repair of such road and its appurtenances, any earth, gravel, stone, timber, or other materials, on or from the land so taken: *Provided*, That the land so taken, otherwise than by consent of the owners, shall not exceed four rods in width, unless where greater width is necessary for excavation or embankment, or procuring stone, gravel, or other materials.

SECT. 5. No corporation shall take, as aforesaid, any meeting-house, dwelling-house, or public or private burying-ground, without the consent of the owners.

SECT. 15. Any railroad corporation may construct and carry their railroad across, over, or under any railroad or canal, when it may be necessary in the construction of the same; and, in such cases, said corporation shall so construct their railroad crossings, as not unnecessarily to impede the travel or transportation upon the railroad, or canal, so crossed. Said corporation shall be liable, in an action on the case, for

the damages occasioned to any corporation or party injured, by reason of said crossing.

SECT. 22. The shares in the capital stock of any railroad corporation shall be deemed personal estate; and they may be transferred by any conveyance in writing, recorded either by the treasurer, in books to be kept in his office, or by an officer duly authorized by the direc-
90 tors, in books to be kept at such other place as they may appoint within the State. When recorded in any other place, they shall, within ten days thereafter, be also recorded in the said books kept by the treasurer. No conveyance of any such shares shall be valid against any other persons than the grantors or their representatives, unless so recorded.

SECT. 23. On making any such transfer, the certificates of the shares transferred shall be given up and canceled, and new certificates shall be issued to the purchasers, unless some attachment of such shares shall have been made previous to such transfer; in which case, the issuing of said certificates shall be suspended until said attachment shall be dissolved, or the shares sold by process of law.

From the acts of 1843—*Chap.* 14.—*An act regulating voting by proxy.*

Be it enacted by the senate and house of representatives in legislature assembled, as follows:

SECT. 1. It is and it shall be lawful, for all stockholders, or owners of shares, in any incorporated company, instituted under the laws of this State, to be represented at all meetings of said corporations by their authorized proxies or agents.

SECT. 2. All proxies shall be dated, not exceeding thirty days, anterior to the meeting for which they are intended, which meeting shall be particularly expressed therein; and which proxy shall become void and of no effect whenever all the articles mentioned in the warrant for calling the meeting shall have been acted on or disposed of, or at the final adjournment of said meeting: *Provided, always*, That the rights of individual stockholders are hereby in no wise affected or abridged from representation, by their authorized agents under general
91 powers of attorney; but such power of attorney shall be recognized as valid, until revoked.

SECT. 3. All shares pledged or hypothecated to any corporation shall cease to be represented by the pledgor, or any other person, so long as the same remains so pledged or hypothecated.

SECT. 4. No person shall be allowed to give a greater number of votes at any meeting, by virtue of one or more proxies, or powers of attorney by him held, than the highest number of votes that any member of said corporation may be entitled to give, in his own right, pursuant to the by-laws of said corporation.

SECT. 5. All acts and parts of acts inconsistent with this act are hereby repealed.

Approved March 21, 1843.

By-laws of the Kennebec and Portland Railroad Co.—Adopted Oct. 28, 1846.

1. ANNUAL MEETINGS.

There shall be a stated meeting of the stockholders of the Kennebec and Portland Railroad Company, on the last Wednesday in October

annually, at such time of that day, and at such place in the State of Maine, as the directors shall determine. At such stated meeting, there shall be elected by ballot, from the stockholders, nine directors.

2. MEETINGS OF STOCKHOLDERS.

All meetings of the stockholders shall be called by an advertisement, signed by the president or secretary of the corporation, and published in one or more newspapers, if such there shall be, printed in Augusta, Portland, and Boston, at least ten days before the day appointed for the meeting. Special meetings of the company shall be called in like manner, whenever any twenty or more of the stockholders shall in
92 writing require the president or secretary to call such meeting. The directors shall determine the time and place of every meeting for which different provision is not made. The objects of every meeting of the company shall be stated in the notice calling the same.

3. VOTES AND PROXIES.

At the meetings of the company, all votes shall be given by the stockholders in person, or by proxy. Each member shall be entitled to one vote for each share held by him, not exceeding fifty votes. Authority to act as proxy shall be in writing, signed by the proprietor.

4. QUORUM OF STOCKHOLDERS.

At all meetings of the stockholders, twenty stockholders entitled to vote, shall constitute a quorum; and when twenty such stockholders shall not be present or represented at any such meeting, the same shall be adjourned to such time and place as a majority of those present shall determine.

5. DIRECTORS AND TENURE OF OFFICE.

The directors, and every officer chosen or appointed by them, or by the stockholders, shall hold their respective offices for the term of one year, and until others shall be elected and qualified in their places, excepting in cases of death, resignation, or removal, and excepting that every director shall cease to retain any office in the company when he ceases to be a stockholder. Not less than five of the directors shall constitute a quorum for the transaction of business; and in all cases in which power is given or shall be given to the directors to do or authorize any act, the same may be done or authorized by a majority of the board present at their meeting, provided that a quorum be present. The directors may fill any vacancy that may happen in their board, provided it be done by the consent of two-thirds of the directors remaining in office; and until such vacancy be supplied, all the powers and authority conferred on the whole board of directors shall be held and enjoyed by such remaining directors, or by a quorum of them.

93 6. ELECTION OF SECRETARY AND OTHER OFFICERS.

The directors shall chose a secretary of their board, who shall also be the secretary of the company; also a treasurer of the company, an engineer, and all such other officers and agents as they may deem needful; and all officers and agents, chosen or appointed by the directors, shall be removable at their pleasure; and the directors shall assign their respective duties, and fix their compensation.

7. DIRECTORS' POWERS.

The directors may establish suitable rules, consistent with the by-laws for the regulation of their own proceedings; may authorize the treasurer to hire such sums of money as they may deem necessary for the use of the company, not exceeding one hundred and fifty thousand dollars, and cause suitable bonds, promissory notes, or other securities, to be given for the payment thereof, with or without interest, as they may deem expedient. The directors may purchase in the name and for the use of the railroad company all such real estate, materials, engines, cars, and other things, as they shall deem needful for depots, for the making, completion, and use of said railroad company, and for the transportation of persons, goods, and merchandise, and other things, and make any and all compromises and settlements, concerning any real estate taken for the use of said road. They may cause such buildings to be erected as they may deem necessary or advantageous to the interests of the company. They may sell by public vendue or private sale, and cause to be transferred and conveyed any personal property of the company for such consideration and on such terms as they think proper. They may sell and cause to be conveyed any lands and real estate of the company, excepting the railroad, to such corporation, corporations, person or persons in fee-simple, or for any less estate, on such terms or conditions, for such prices or consideration, by public vendue
94 or private sale, as they from time to time shall deem expedient and for the interest of the company, and shall cause suitable conveyances to be made thereof; they may lease any of the real estate, excepting said railroad, or personal property of the company they may deem expedient, at such rents and on such terms as they may think proper, and cause suitable leases to be made thereof. The directors shall declare all dividends, allow accounts, superintend the conduct of the different officers and agents, chosen or appointed by them; and may exercise by themselves, or their agents, or the powers and authority granted to the corporation by their charter, for the purpose of locating, constructing, and completing the railroad therein mentioned, for the transportation of persons, goods, and merchandise, for establishing the rates of toll on said road, and the collection thereof, and all such other powers and authority for the management of the affairs of the corporation, as may be necessary and proper to carry into effect the objects of the company, and the purposes of their charter.

8. SECRETARY.

The secretary shall be sworn to the faithful discharge of the duties of his office, by a justice of the peace, immediately after election, and his oath shall be entered, with the signature of the magistrate, on the records of the corporation. He shall attend all meetings of the stockholders and of the directors, and shall keep records of their doings in separate books. In his absence, one of the directors shall be elected a secretary pro tempore by the stockholders or directors, who shall be sworn, and do all things, while he remains in office, required of the secretary of the corporation.

9. TREASURER.

The treasurer shall give bonds to the corporation, with sufficient sureties to the satisfaction of the directors, in the penal sum of not less

than thirty thousand dollars, for the faithful discharge of his
95 trust. He shall have an office in such place as the directors shall determine, accessible to all persons having business with the corporation, or any of its officers or agents. He shall keep all deeds, promissory notes and valuable papers of the company. He shall collect and receive all assessments, income, and moneys that may be due to the company, and disburse the same as the board of directors shall order. He shall surrender notes and other promissory papers on payment thereof, and discharge such mortgages as may have been given concerning the same. He shall keep a regular set of books containing the accounts of the company, and all its funds that may pass through his hands. He shall lay before the directors a written statement of all notes, drafts, promises, and contracts, made, signed, endorsed, or surrendered by him; an abstract of all moneys received and paid; a statement of all property bought and sold; and such other matters as he or the board of directors may deem important, when called for. He shall make a complete settlement of the accounts and books at least annually, and as much oftener as the board of directors shall require, and shall advise what dividends of profits may be made. He shall make to the legislature, and to all officers of the State government, whether under oath or otherwise, any exhibits or statements of the affairs of the corporation, or net profits derived from the income of said railroad, which now or may hereafter be required by the laws of the State. He shall render an account of his doings to the stockholders at their annual meeting, and quarterly if they direct it. He shall notify the stockholders of all assessments, in the manner prescribed by the by-laws. He shall deposit to his credit as treasurer of the Kennebec and Portland Railroad Company, and in such bank or banks as the directors may from time to time designate, all moneys received by him. He
96 shall issue certificates of stock to all persons entitled thereto, and keep suitable books, showing the number of shares held by the respective stockholders from time to time. He shall attend faithfully to the duties prescribed in the by-laws, and do all other duties which the directors may require him to perform.

10. Notes and contracts.

Every promissory note made in behalf of the company, shall be signed by the treasurer, and, for any larger sum than one thousand dollars, shall be approved in writing by two or more of the other directors, and every such note shall be sufficient and valid against the company.

11. Engineers.

The engineer shall lay out said railroad, and cause the same to be made and completed in all respects, pursuant to the instructions he may receive from the board of directors or their agents thereto authorized. He shall make and deliver to the board written estimates and reports concerning the construction and use of said road, and all things relating thereto, as the board shall from time to time require, or as he shall deem important, and he shall faithfully perform all other acts and duties connected with his office which the said board may assign to him.

12. Seal.

This company shall have a common seal, to be preserved and kept by the treasurer, bearing the words and figures, "Kennebec and Portland Railroad Company, incorporated April 1, 1836."

13. CAPITAL STOCK.

The capital stock of the company shall consist of twelve thousand shares of one hundred dollars each, and the number thereof may be increased, from time to time, as the directors shall determine and the legislature authorize, provided they shall not exceed twenty thousand shares.

14. STOCK-CERTIFICATES.

The holders of shares in said capital stock shall be entitled to certificates thereof, to be signed by the president, countersigned by
97 the treasurer, and authenticated by the common seal; and all certificates of shares in said stock shall be in the following form:

Ken. & Port. R. R. Co.

Transfer No.

Old certificate No.

New certificate No.

From

To

For shares.

Dated 18

Received a certificate for shares, pursuant to the above.

Kennebec & Portland Railroad Co.

No.

Be it known that proprietor of shares in the capital stock of the Kennebec and Portland Railroad Company, subject to all assessments thereon, and to the provisions of the charter and the by-laws of the corporation, the same being transferable by an assignment thereof in the books of said corporation, or by a conveyance in writing recorded in said books; and when a transfer shall be made or recorded in the books of the corporation, and this certificate surrendered, a new certificate or certificates will be issued.

Dated at the day of A. D. 18 .

President.
Treasurer.

[SEAL OF THE CO.]

15. TRANSFERS.

All transfers of shares in the capital-stock of said company shall be in the following form, to be printed on the back of every stock-certificate, which form shall also be adopted for the transfer-books of said company, viz:

98 *Ken. & Port. R. R. Co.*

Transfer No.

From

To

For shares.

Dated 18 .

Kennebec & Portland Railroad Co.

SHARES.

For value received hereby transfer to of shares of the capital-stock of the Kennebec and Portland Railroad Company, subject to all assessments, and to the provisions of the charter, and to the by-laws of the corporation.

Dated at A. D. 18 .

Witness:

All transfers of shares shall be recorded either by the treas
books to be kept in his office, or by an officer duly authorized
directors, in books to be kept at such other place as they may appoint. On the receipt of such transfer or assignment, and of the original certificate, a new certificate or new certificates shall be issued to the person or persons who, by virtue of such assignment, shall become the proprietors of shares; and receipts shall be given to the treasurer of all stock-certificates received of him.

16. Assessments.

The president and directors may from time to time make such equal assessments on all the shares in said corporation as they may deem expedient and necessary for the purposes of the company, and may direct the same to be paid to the treasurer, at such time and place as they shall deem proper; and the treasurer shall give notice the amount per share of every such assessment, and of *of* the time and place when and where the same will be due and payable, by advertisements in one or more newspaper to be printed in Augusta and Boston, and by
99 written or printed circular addressed to each subscriber to stock, deposited in the post-office in the town in which the treasurer lives, (whose certificate of the fact shall be deemed legal evidence thereof,) at least thirty days before the day fixed for payment thereof; and if any stockholder shall neglect or refuse to pay any assessment or assessments on his share or shares in said company for the space of thirty days after the first publication of such notice, the directors may order the treasurer, after giving notice, as hereinafter provided, of the sale, to sell any or all of such shares by public auction, to be held in such place or places as the directors may appoint, to the highest bidder; and the same shall accordingly be transferred by the treasurer to the purchaser, who shall be entitled to receive a certificate thereof. And notice of every such sale shall be given by the treasurer in one or more newspapers printed in the cities of Boston and Portland, and towns of Augusta, Gardiner, and Bath, or in so many thereof as shall, at the time of such notice, have a newspaper printed therein, at least thirty days before the day of such sale, designating the time and place thereof, and the shares to be sold. If the shares of any such delinquent stockholder shall not sell for a sum sufficient to pay his assessments, with interest and charges of sale, he shall be held liable to the corporation for any deficiency, and if such shares shall sell for more than the assessment so due with interest and charges of sale, he or his legal representatives shall be entitled to the surplus remaining after such sale. But no assessment shall be laid on the shares in said company of a greater amount in the whole than one hundred dollars on each share.

17. Deeds.

All deeds and conveyances which shall be made in fee-simple, or for any other or less estate, except of said railroad, and all leases of any real
estate owned by said company, executed and acknowledged by the
100 president, countersigned by the treasuaer, and authenticated by the seal of said company, are hereby declared to be the acts and deeds of said company, and shall be valid and effectual as such to all intents and purposes.

18. AMENDMENTS.

These by-laws shall not be altered, except at the annual meeting, or at a special meeting of the stockholders called for that purpose.

Extract from plaintiff's testimony.

J. W. SPAULDING. August 26th, 1865, deposited in post-office in Hallowell, by direction of president of Kennebec and Portland Railroad Company, papers of which the following is an exact copy, directed—

One to John S. Cushing, treasurer, Augusta, Me.
" " John Patten, Bath, "
and " " Joseph McKeen, Brunswick, "
Postage paid.
(Signed)

W'M M. REED,
President K. & P. R. R. Co.

BATH, *Aug. 25th*, 1865.

To Joseph McKeen and John Patten, trustees of the first and second mortgage bonds issued by the Kennebec and Portland Railroad Company, and John S. Cushing, treasurer:

You are hereby notified and requested to render within ten days after the receipt hereof, a true account in writing of the amount due on the mortgages given to secure the bonds issued by said Kennebec and Portland Railroad Company, on the fifteenth day of October, 1851, and on the fifteenth day of October, 1852, and of the rents, income, and profits, and money expended in repairs and improvements of said railroad.

W'M M. REED,
President K. & P. R. R. Co.

101 *Exhibits filed by defendants.*

Extracts from records of first and second mortgage bondholders.

Extracts from records of stockholders of the Kennebec and Portland Railroad Company.

Extracts from records of directors.

Extracts from records of treasurer and trustees.

Contract of sale, Williams to Rice, Sept. 20th, 1861.

Contract of sale, Rice to bondholders, Feb. 17th, 1862.

Contract of sale, Rice to Brown, and als., May 17th, 1862.

Mortgages of June and Nov. 1855. Corporation to Williams.

Notice of foreclosure with proof of publication in newspapers and recording in registry of deeds, in the counties of Sagadahoc, Cumberland, and Kennebec.

Annual printed reports of the superintendent and manager, trustees and treasurer, and the president and directors of the Kennebec and Portland Railroad Company. And of the president and treasurer of the Portland and Kennebec Railroad Company.

Acts of the legislature respecting the Portland and Kennebec Railroad Company. Certificates of preferred stock. Agreement with the Somerset and Kennebec Railroad to pay interest on cost for a lease of that road. Acts of the legislature incorporating and extending charter of Somerset Railroad.

Annual printed reports of earnings and expenditures of Boston and Maine, Eastern, Western, Worcester, Erie, and Grand Trunk Railroads.

Notice of foreclosure.

Whereas the Kennebec and Portland Railroad Company, on the fifteenth day of October, A. D. 1852, by their mortgage deed of
102 that date, conveyed to the subscribers, Joseph McKeen, John Patten, and M. S. Hagar, as trustees, to take and hold in trust for the security of the holders of the bonds of said company then authorized to be issued, all their railroad, as now made, from Portland to Augusta and from Brunswick to Bath, inclusive, and all their corporate property, real and personal, and the franchise of said company including the road and superstructure and all the land conveyed to said company by others, for a description of which reference is to be had to the several deeds recorded in Cumberland, Lincoln, and Kennebec, as well as the right of way paid for, and all the buildings thereon, and the personal property consisting of engines and tenders, passenger, freight, platform, and dirt cars, snow-ploughs, and apparatus of every description, subject, however, to prior mortgage thereon, upon the condition and for the purpose of securing the payment of bonds, for two hundred and fifty thousand dollars, on the fifteenth day of October, A. D. 1864, and of well and promptly paying semi-annually the interest on their bonds, dated October 15th, 1852, (coupons on said bonds,) all which more fully appears by the said mortgage deed, which is recorded with the records of deeds for Kennebec County, book 179, page 370. And whereas the said Kennebec and Portland Railroad Company, have refused and neglected to pay to the holders of said bonds, within ninety days after presentation for payment, the interest (coupons of said bonds) due since April 1st, 1856, and still refuse and neglect to pay the same: And whereas, on the 15th day of April, A. D. 1859, Reuel Williams, owning and holding forty-eight thousand and eight hundred dollars of said bonds; J. L. Cutler, trustee, owning and holding one thousand dollars of said bonds; D. Alden, owning and holding seven thousand and six hundred dollars of said bonds; W. A. Brooks, owning and holding
103 one thousand dollars of said bonds; W'm R. Smith, owning and holding fifteen hundred dollars of said bonds; L. W. Lithgow, and as trustee, owning and holding twenty-five hundred dollars of said bonds; W'm D. Sewall, owning and holding seven thousand dollars of said bonds; William D. Sewall, trustee, owning and holding thirty-three hundred dollars of said bonds; George F. Patten, owning and holding thirty-five thousand dollars of said bonds; and H. S. Hagar, owning and holding forty-three hundred dollars of said bonds, in all amounting to one hundred and twelve thousand dollars of said bonds, being more than one-third of said mortgage, all the interest (coupons) of said bonds since April 1st, 1856, being unpaid and dishonored, made application in writing to the subscribers to have said mortgage foreclosed because the semi-annual interest (coupons) on said bonds, have not been paid since April 1st, 1856, and now remain unpaid, whereby the conditions of said mortgage-deed have been and now are broken: Now, therefore, the subscribers give notice that, by reason of the breach of the condition in said mortgage to them, by said Kennebec and Portland Company in refusing and neglecting to pay the semi-annual interest (coupons) due upon said bonds since April 1st, 1856, they claim to foreclose the said mortgage.

JOSEPH McKEEN,
JOHN PATTEN,
M. S. HAGAR,
Trustees as aforesaid.

BRUNSWICK, *May 18th*, 1859.

KENNEBEC, *ss:*

CLERK'S OFFICE, SUPREME JUDICIAL COURT,
Augusta, May, 1868.

I hereby certify that the foregoing "Notice of foreclosure" was copied by me from the Kennebec Journal, the newspaper published by the State printers, and printed at Augusta, in the said county of
104 Kennebec, and was published in said newspaper three weeks successively, to wit, on May 20th and 27th, and June 3d, 1859, and that said copy is a true and correct copy. I further certify that I have examined the newspaper called "The Age," published at said Augusta, in said county of Kennebec, and find the same notice printed therein in the issues of May 26th, and June 2d and 9th, 1859; also, the "Eastern Times," a newspaprer published at Bath in the county of Sagadahoc, and the "Brunswick Telegraph," a newspaper published at Brunswick, in the county of Cumberland, and I find the same notice printed in those papers under the dates respectively of May 20th and 27th and June 3d, 1859. I further certify that in the list of bondholders mentioned in said notice I find the name of Hagar printed "*M.* S. Hagar" in the Age, while in the other papers it is "*H.* S. Hagar."

W'M M. STRATTON,
Clerk of said Court.

BRUNSWICK, *June, 26th,* 1858.

We hereby certify that we have caused the above notice of foreclosure to be printed three weeks successively in the newspaper published by the State printer, and in a newspaper published in each of the counties into which said Kennebec and Portland Railroad extends, viz: In the Kennebec Journal, published at Augusta, in the county of Kennebec, the newspaper published by the State printer, on the 20th and 27th days of May and the 3d day of June, A. D. 1859; in the Age, published in Augusta in the county of Kennebec, on the 26th day of May, and the 2d and 3d [9th] days of June, 1859; in the Eastern Times, published in Bath in the county of Sagadahoc, on the 20th and 27th days of May and the 3d day of June, 1859, and in the Brunswick Telegraph, published in Brunswick, in the county of Cumberland, on the 20th and 27th
105 days of May and the 3d day of June, 1859. We certify these facts and dates to be recorded in each of said counties in its registry of deeds, within sixty days from the time of each said first publication, in conformity to the provisions of section 55, of chapter 51, of the revised statutes of Maine.

JOSEPH MCKEEN,
JOHN PATTEN,
M. S. HAGAR,
Trustees as aforesaid.

Recorded according to the original, rec'ived June 21st, 1859, at 9 o'clock a. m.
Attest.

AUGUSTUS F. GERRISH,
Register.

At a meeting of the directors of the Kennebec and Portland Railroad Company, held at Augusta, August 18th, 1856, the president of the road was authorized to enter into an agreement on the part of the company with the trustees of the holders of the bonds of the company, whereby they may take possession of the road upon the condition fol-

lowing, viz: The coupons of the bonds of the Kennebec and Portland Railroad Company, dated October 15th, 1851, and October 15th, 1852, due last April, and perhaps some others past due, not having been paid, and the trustees of the holders of these bonds being desirous to take possession, and according to the terms of the mortgage made to them to secure the payment of said bonds, the directors of said road not having the means at present to pay and take up these coupons, consent that said trustees may, on the first day of September next, enter and take possession of the road under their said mortgage deed thereof, and hold the same until the interest due upon those bonds shall be paid, upon the following terms and stipulations:

The road is to be run and managed by the directors thereof, for the time being, for said trustees of the bondholders, until the bond-
106 holders shall have been paid all the interest due to them, and the earnings and profits thereof are to be paid into the hands of Reuel Williams, or to some one for whom he will be accountable, and in case of his death or inability to perform the trust, into the hands of some other one to be agreed upon by the trustees and directors, who shall keep an accurate and perfect account of all receipts and payments after said first of September, subject at all times to the inspection and examination of the trustees and of the directors, and all such receipts and payments shall be daily entered on a book to be kept for that purpose; and the receipts of the road are hereby appropriated and to be applied to the following purposes and objects, viz: First. To pay running expenses, maintenance of way, cost of repairs, and keeping up the rolling-stock and buildings, and for such improvements and alterations as the president and directors of the road and the trustees may agree upon. Second. To pay the Whitmore debt, on which an attachment was made, taxes and arrearages of taxes against the company, arrearages of dividends heretofore made, and interest on renewals of the treasurer's notes to banks, endorsed by said Williams and secured by his mortgage. Third. To pay overdue coupons on $45,600, bonds of the company, for which one-twentieth of the road is mortgaged, and the coupons on these bonds and of the scrip of cities and towns, for which nineteen-twentieths of the road is mortgaged, as they severally become payable. Fourth. To pay five per cent. semi-annually on the mortgage to trustees of the contributors for building the Yarmouth part of the road. Fifth. To pay to said Williams, monthly, fifteen hundred dollars for the use of the rolling-stock and personal property mortgaged to him, which sums are to be regarded as paying him so much of the debt secured by that mortgage. Sixth. To pay the commissioners of the sinking fund
107 one and one-half per cent. annually, including the present year, on seven hundred and fifty-five thousand dollars, for which certain cities and towns loaned their credit to the road in 1850. Seventh. Whatever balance may remain after making the foregoing payments is to be applied to paying and taking up coupons of cities and towns, now overdue, and interest thereon till paid, in the hands of parties who hold them; and after those coupons are taken up, the surplus is to be applied under the direction of the trustees, first, to the payment of coupons on the bonds of 1851, and then to pay coupons on the bonds of 1852. And when all those coupons, then due and payable, shall have been paid, this agreement is to terminate, and the power of the trustees under this arrangement is to cease; and either party may terminate it at the end of one year by giving thirty days' written notice to the other party before the expiration of the year.

The following notice, to wit:

Notice of foreclosure.

* * * * * * *

having been published and recorded according to law, the bonds below described, (with the coupons thereon falling due on April 15, 1856, and subsequent to that time,) secured by the mortgage referred to in said notice, to wit:

Bonds.

Number.	Amount.	
158	$1,000 00	
100	500 00	
33	500 00	
99	500 00	
32	500 00	
128	1,000 00	
129	1,000 00	
108 127	1,000 00	
133	1,000 00	
18	1,000 00	
62	1,000 00	
		$9,000 00
35	1,000 00	
147	1,000 00	
134	1,000 00	
163	1,000 00	
161	1,000 00	
38	1,000 00	
22	1,000 00	
148	1,000 00	
20	1,000 00	
72	1,000 00	
19	1,000 00	
91	1,000 00	
		12,000 00
28	1,000 00	
149	1,000 00	
21	1,000 00	
70	1,000 00	
25	1,000 00	
69	1,000 00	
23	1,000 00	
89	1,000 00	
24	1.000 00	
71	1,000 00	
27	1,000 00	
		11,000 00
65	1,000 00	
26	1,000 00	
64	1,000 00	
90	1,000 00	
63	1,000 00	
60	1,000 00	

109	66	1,000 00	
	61	1,000 00	
5		500 00	
14		500 00	
28		300 00	
5		100 00	
4		100 00	
			9,500 00
			$41,500 00

were presented to us thirty days before the redemption of said mortgage expired, and remained in our hands from that time until three years from the time of the first publication of said notice had fully expired, during which time no party appeared to pay or tender payment of said bonds or coupons or any part thereof, or of either of them.

July 1, 1862.

JOS. McKEEN,
JOHN PATTEN,
Trustees named in the above-described Deed of Mortgage.

And now in this term an order is received from the law court (received Dec. 8th, 1870,) to make upon the docket under said case the following entry, to wit, "Bill dismissed."

Attest. W'M M. STRATTON, *Clerk.*

110 STATE OF MAINE, *Kennebec County, ss:*

CLERK'S OFFICE, SUP. JUD. COURT,
Augusta, February 22, 1872.

I hereby certify that I have carefully compared the annexed copy with the record of a judgment, remaining in the office of the clerk of the judicial courts, holden in and for the county of Kennebec, and find the same to be a true transcript and exemplification thereof.

In testimony whereof I hereunto subscribe my name and affix the seal of said supreme judicial court.

[SEAL.] W'M M. STRATTON, *Clerk.*

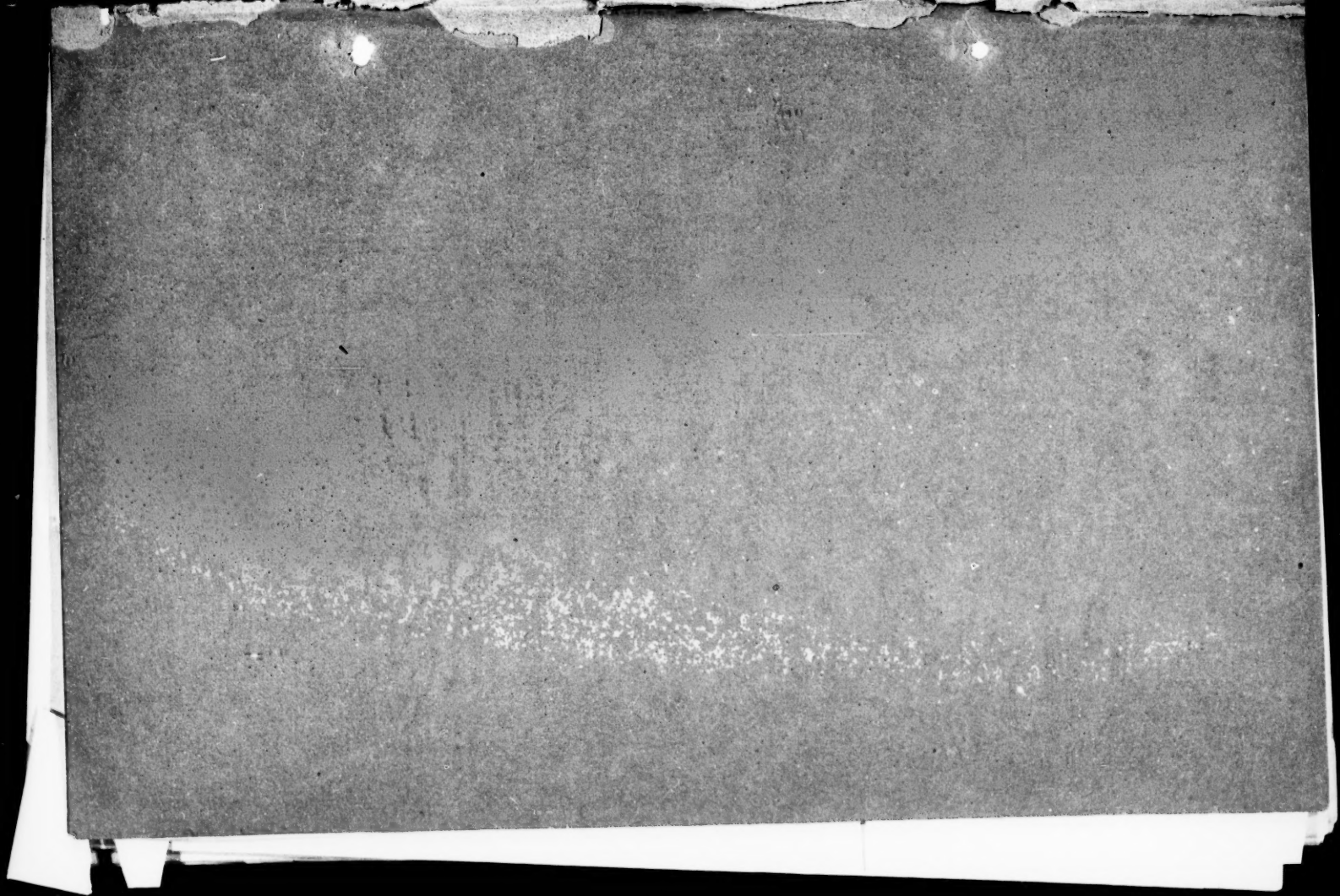
STATE OF MAINE, *ss:*

I, John Appleton, chief justice of the supreme judicial court of said State of Maine, do hereby certify that William M. Stratton, esquire, whose signature is affixed to above-written certificate, is clerk of
111 said court for said county of Kennebec, and hath the keeping of the files, records, and proceedings of said court, holden within and for said county, and is by law the proper officer to make out and certify copies thereof, and that public faith and credit are due and of right ought to be given to all his official acts and attestations, done as clerk aforesaid; and that his attestation to the copy of record hereto annexed, is in due form of law.

In witness whereof I hereunto set my hand and caused the seal of said supreme judicial court to be hereunto affixed, at Augusta, this 22d day of February, anno Domini one thousand eight hundred and seventy-two.

[SEAL.] JOHN APPLETON.

(Indorsement on cover:) No. 330. The Kennebec & Portland Railroad Company, plaintiff in error, vs. The Portland & Kennebec R. R. Co., John Patten, surv'g trustee, R. D. Rice, & al. Certiorari and return. Maine jud'l sup' court. Filed 26th February, 1872.



Supreme Court of the United States.

THE KENNEBEC AND PORTLAND RAILROAD COMPANY, *Plaintiffs in error,*

v.

THE PORTLAND AND KENNEBEC RAILROAD COMPANY, AND JOHN PATTEN, SURVIVING TRUSTEE, AND ALS.

In error to the Supreme Judicial Court of the State of Maine.

BRIEF OF DEFENDANTS IN ERROR.

ARTEMAS LIBBEY.

Supreme Court of the United States.

THE KENNEBEC AND PORTLAND RAILROAD COMPANY, *Plaintiffs in error*,

v.

THE PORTLAND AND KENNEBEC RAILROAD COMPANY, AND JOHN PATTEN, SURVIVING TRUSTEE, AND ALS.

In error to the Supreme Judicial Court of the State of Maine.

This is a bill in equity brought by the plaintiffs in error to redeem a mortgage of the railroad of plaintiffs extending from Augusta to Portland and from Brunswick to Bath, in the State of Maine, with the rolling stock belonging to the road, and their franchise, made on the 15th day of October, A. D. 1852, to trustees to secure the payment of their bonds of that date for $250,000, with interest warrants attached, called the second mortgage.

The bill of complaint admits a breach of the mortgage by non-payment of the interest on the bonds in

October, 1856, and that the trustees named in the mortgage by reason thereof took possession of the road in 1857. The bill admits in substance that the interest on the bonds had not been paid since April, 1856. It alleges a tender of the amount due to the *trustees* and *bondholders* in 1865. The prayer of the bill of complaint is that the defendant corporation may be required to account, and that the plaintiffs may be let in to redeem on payment of what may be found due. There is no formal offer in the bill to pay what may be found to be due on settlement. It alleges the organization of the defendant corporation in 1863, and that they hold the mortgage title. There is no averment of tender to the defendant corporation.

The answer of the defendant corporation admits the making of the mortgage and the issuing of the bonds as alleged; alleges the breach of the condition of the mortgage by failure to pay the interest on the bonds after April, 1856; the taking of possession by the trustees for breach of the conditions, and denies any tender or offer on the part of the plaintiffs to pay the amount due.

It denies that the plaintiffs were seized of the equity of redemption, sets for the proceedings by the trustees commenced June 20, 1859 to foreclose the mortgage, and avers a foreclosure thereof in June, 1862, a conveyance from the trustees to the defendant corporation in January 1864, and absolute title in them.

The proceedings for foreclosure were by publication of

a notice in a newspaper in each county into which the railroad extended, and also in the State paper, three weeks successively, and a record of the notice within thirty days in the registry of deeds in each of said counties. They are particularly set forth in the answer.

The defendants demurred to the original bill, and the demurrer was sustained; but at the August term, 1867, leave to amend the bill was granted on conditions, and amendments were filed at the October term of said court, 1867. At the same term defendants filed a motion to dismiss the suit for non-compliance, by plaintiffs, with the conditions on which the amendments were granted.

The question raised by the bill and answer was whether the plaintiffs had a right to redeem the said mortgage from the defendants.

The decree in the State court was that the bill be dismissed.

The statute of the State of Maine for the foreclosure of mortgages of real estate in 1852, at the time this mortgage was executed, was as follows:

"SECT. 3. After breach of the condition, if the mortgagee, or any one claiming under him, is desirous of obtaining possession of the premises, for the purposes of foreclosure, he may proceed in either of the following ways, viz:

First. He may commence an action at law, and obtain possession under a writ of possession, issued on the judgment in the action, as provided in the ninth section, duly executed by an officer;

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First. He may commence an action at law, and obtain possession under a writ of possession, issued on the judgment in the action, as provided in the ninth section, duly executed by an officer;

Second. He may enter into possession, and hold the same, by consent, in writing, of the mortgager, or the person holding under him;

Third. He may enter peaceably and openly, if not opposed, in the presence of two witnesses, and take possession of the premises; in which case, a certificate of the fact and time of such entry shall be made and signed and sworn to by such witnesses before any justice of the peace; and such written consent, and such certificate, shall be recorded in each registry of deeds, in which the mortgage is or by law ought to be recorded; and no such entry shall be effectual, unless such certificate, or consent in writing, shall be recorded within thirty days next after such entry is made.

SECT. 4. Such possession obtained in either of the three modes above described, being continued for the three following years, shall forever foreclose the right of redemption.

SECT. 5. If, after breach of the condition, the mortgagee or any person, claiming under him, is not desirous of taking and holding possession of the premises, he may proceed for the purpose of foreclosure, in either of the two following modes, viz:

First. He may give public notice in the newspaper, printed in the county, where the premises are situated, or, if there be none such, then in an adjoining county, or in the newspaper published by the printer to the state, three weeks successively, of his claim by mortgage on such real estate, describing such premises intelligibly, and naming the date of the mortgage, and that the condition in the same has been broken, by reason whereof he claims a foreclosure; and cause a copy of such printed notice, and the name and date of the newspaper, in which it was last published, to be recorded in each registry of deeds, in which the mortgage deed is, or by law ought to be recorded, within thirty days after such last publication; or,

Second. He may cause a copy of such notice to be served and attested as a true copy, by the sheriff of the county or his deputy, in which the mortgager or his assignee lives, if in this state, by a delivery to him in hand, or by leaving the same at his place of last and usual abode; and shall cause the original notice and the sheriff's return thereon to be recorded, within thirty days after such service, in manner aforesaid.

SECT. 6. The mortgager or person, claiming under him, may redeem the mortgaged premises within three years next after taking possession, or publication, or service of the notice, mentioned in the preceding sections, and, if not so redeemed, his right of redemption shall be forever foreclosed."

Revised Statutes of 1841, ch. 125, § 3, 4, 5 and 6.

Section thirty of the same chapter, in regard to mortgages of personal property, is as follows:

"SECT. 30. When the condition of any mortgage of personal property has been broken, the mortgager, or any person lawfully claiming or holding under him, may redeem the same at any time, within sixty days next after said breach, unless the property shall have been sold in the mean time, in pursuance of the contract between the parties, or on execution for the debt of the mortgager."

If the property was not redeemed by the mortgagor within sixty days after breach of condition, the title became absolute in mortgagee.

Thompson v. Moore, 36 Me. R. 47.
Clapp v. Glidden, 39 Me. R. 448.

There was no statute providing specially for the foreclosure of railroad mortgages till 1857, when the following statute was enacted:

"SECT. 55. In order to obtain a foreclosure of the mortgage, the holders of any such dishonored bonds or coupons may apply to the trustees under the deed securing the same, to have such mortgage foreclosed, and it shall be the duty of such trustees, upon application of bondholders to an amount equal to one-third of the amount of such mortgage, immediately to give public notice three weeks successively, in the newspaper published by the state printer, and in a newspaper published in each of the counties into which said road extends, if any shall be published therein, stating the date and conditions of the mortgage, and the claim of the applicants under it, and that the conditions thereof have been broken, by reason whereof they claim a foreclosure; and they shall cause a copy of such printed notice, and the name and date of each of said newspapers containing it, to be recorded in each of such counties, in its registry of deeds, within sixty days from the time of the first publication. And unless, within three years from the time of such first publication, the property shall be redeemed by the mortgagers or persons claiming under them, the right of redeeming shall be forever foreclosed, unless some bill in equity to redeem, founded on payment, or on an adequate and sufficient tender of the amount of the overdue bonds and coupons secured by said mortgage, had then previously been commenced.

SECT. 56. Upon the completion of such recordings, the procedure for foreclosure shall inure to the benefit of all the holders of any such bonds or coupons, which, at the time of such completion, had been dishonored as above described; and it is only upon the payment or tender of payment of all such bonds and coupons, that the foreclosure shall be prevented; provided that tender may be made to the trustees, at any time after the notice, and before the foreclosure shall become absolute; and it shall be the duty of the holder of such dishonored bond or coupon, to present them to said trustees thirty days

before the time of redemption shall expire, and such mortgage shall not be foreclosed by reason of the non-payment of any not so presented. Any person claiming under the mortgagers shall have free access to the books of the corporation to ascertain the amount of the over-due bonds and coupons remaining unpaid.

SECT. 57. If the foreclosure of the mortgage be effectuated, it shall inure to the benefit of all the holders of bonds and coupons provided for in its condition. And they, their assigns and successors, are hereby constituted a company, incorporated and chartered as of the day of the foreclosure, for all the purposes of the original company, with all the chartered and legal rights and immunities, which pertained to the original company at the time of the foreclosure; and it shall be [the] duty of the trustees, by suitable deed of release, to convey to such new company all the rights and interest by them held in said railroad, appurtenances, and franchise, and other property, by virtue of their deed of trust and the foreclosure thereof; and if they neglect or refuse so to do, the court, upon application in equity, shall have power to compel them so to do; and upon such conveyance the said trustees shall be discharged of their trust."

Revised Statutes of 1857, ch. 51, § 55, 56 and 57.

In 1852 when this mortgage was executed, and at the time it was foreclosed, there were no other modes of foreclosing a mortgage in Maine than those contained in these statutes.

Ireland v. Abbott, 24 Me. 155.
Shaw v. Gray, 23 Me. 178.
Chase v. Palmer, 25 Me. 345.
Opinion of the Court in this case.

In order to give this court jurisdiction of this case under the 25th section of the act of 1789, it must be shown by the record itself to be one of the cases enumer-

ated in that section. This must be shown in one of the following modes:

1st—Either by express averment, or by necessary intendment in the pleadings in the case.

2d—By the directions given by the court, and stated in the exceptions.

3d—It must be entered on the record of the proceedings in the Appellate Court, in cases where the record shows that such a point may have arisen and been decided; that it was in fact raised and decided; and this entry must appear to have been made by the order of the court or by the presiding judge by order of the court, and certified by the clerk as a part of the record in the State court.

4th—In proceedings in equity it may be stated in the body of the final decree of the State court from which the appeal is taken to this court.

5th—It must appear from the record that the question was necessarily involved in the decision, and that the State court could not have given the judgment or decree which they passed, without deciding it.

Crowell v. Randall, 10 Peters 368.

Armstrong v. The Treasurer of Athens Co., 16 P. 281.

"It is not sufficient that the point was involved in the case and might have been raised, and might have been decided. It must appear either in direct terms, or by necessary intendment, that it was in fact brought to the notice of the court and decided by it."

Coons v. Gallagher, 15 P. 18.

Crowell v. Randall, 10 P. 368.

The record must show what statute of the State was drawn in question, as repugnant to the constitution or laws of the United States, and what clause of the constitution or law of the United States was violated by it.

Messenger v. Mason, 10 Wal. 507. Cases cited.

It is not enough that the validity of the State statute was drawn in question as repugnant to the constitution or laws of the United States, and that the decision of the court was in favor of its validity; but it must appear that the title depended on that statute.

Williams v. Norris, 12 Wheat. 117.
Gibson v. Choutean, 8 Wall. 317.
Rector v. Ashley, 6 Wall. 142.

Applying the foregoing rules to the case at bar, we contend this court has no jurisdiction.

I. It does not appear by the record, by any averments in the bill, answer, or replication, or in the decree of the court, that the validity of any statute of the State of Maine was drawn in question as repugnant to any provisions of the constitution of the United States.

Nor is it clear from the facts stated in the bill, answers and proofs made a part of the record, by just and necessary inference, that the question was raised and that the State court, in order to have arrived at the decree dismissing the bill, must have come to the decision of that question as indispensable to that decree.

1. The court below may have properly dismissed the bill on the motion which was filed by defendants, on

the ground that plaintiff had not complied with the conditions on which the amendments were granted.

2. It might have been dismissed for want of an averment in the bill of a readiness and offer to pay to defendants what might be found due them on a just settlement. This is one of the grounds on which the demurrer to the original bill was sustained by the State court, and in that respect the bill was not amended. See amendments of bill, page . K. & P. R. R. Co. v. P. &. K. R. R. Co.

54 Me. 173.

3. It might have been dismissed for want of a tender of the amount due before suit.

4. The result may have been reached on the ground that the mortgage was legally foreclosed under the provisions of the statute of 1841, and that therefore plaintiffs had no right to redeem. This would be the result if the court adopted the position maintained by the plaintiffs, that the statute prescribing the mode of foreclosing mortgages, existing at the time this mortgage was executed, became a part of the contract, and that it was not competent for the legislature of the State afterwards to change the mode of foreclosure, on the ground that such change would impair the obligations of the contract; because the record shows that everything was done by the mortgagees which the statute of 1841 required to be done, to foreclose the mortgage, as a mortgage of real estate; and as to the personal property embraced in it,

if any, the title became absolute in sixty days after failure to pay the overdue interest warrants, without any proceedings on the part of the mortgagees.

5. But if it be contended by the plaintiffs that the contract called the second mortgage, is not a mortgage within the provisions of the act of 1841, and could not be foreclosed in any of the modes prescribed therein, then it is a mortgage at common law, with no equity of redemption, and the title became absolute in the mortgagees on breach of the condition. And therefore the decree of the State court dismissing the bill would not involve the determination, that the act of 1857 was not repugnant to the provisions of the constitution of the United States prohibiting a State from passing any law impairing the obligation of contracts. See the opinion of the State court in this case, page eight of the pamphlet herewith submitted.

6. Again, if the court had adopted the positions contended for by the plaintiffs, that the mortgage could not be foreclosed under the act of 1841; nor under the act of 1857, on the ground that that act was void if applied to this mortgage, as repugnant to the constitution of the United States, then the same result would be reached; the plaintiffs could not maintain their bill for redemption from the defendant corporation, because under the act of 1857 the organization of that corporation would be unauthorized, the conveyance from the trustees

to it would be void, and the pretended corporation did not hold the mortgage title, but was in possession of the railroad without right and as a disseizor; and plaintiffs' remedy was at law and not in equity.

Under the act of 1857 the bondholders could not organize themselves into a corporation till the mortgage to the trustees to secure the bonds had become legally foreclosed; nor could the trustees convey the mortgage title held by them till the foreclosure had become absolute.

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OF THE

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MIDDLE DISTRICT, 1870.

S. J. C., Kennebec County.

Kennebec & Portland R. R. Company, (In Eq.,) vs. Portland & Kennebec R. R. Company and others.

KENT, J.

The object and prayer of this bill is, that the plaintiff corporation may be let in to redeem the mortgaged premises, viz:—its road and all its corporate property, described in the deed to trustees for the benefit of what are termed the second mortgage bonds and bondholders.

There is no question that the plaintiff corporation was the original owner of the road, and that it had the rights of a mortgagor under the deed referred to. The question, if not the sole question before us is, whether that right of redemption has been legally and effectually foreclosed. If it has been, there would seem to be no equity or title to the property left in the plaintiffs. If it has not been the plaintiffs should be let in to redeem.

Indeed it would seem, if there has been no legal foreclosure, there can be no legal existence of the defendant corporation—for that exists only by the fact of a prior extinguishment of the right of redemption. St. 1857, ch. 51.

In the argument several objections are started touching the validity of the mortgage deed. It is said that the vote of the stockholders did not authorize the president to mortgage the personal property or the franchise, and that therefore the deed at least as to those particulars was unauthorized and void.

An answer to this question, which certainly seems formidable, is that the bill nowhere sets up or alleges these matters, but simply sets out the existence of a legal mortgage. but denies any foreclosure and asks to redeem. The argument is, that if there was no legal mortgage no title passed and the remedy would be at law, or in equity to obtain a decree to declare the deed void, for the purpose of removing a cloud from the title of the plaintiffs.

On examination of the bill, it will be seen that it sets out in the commencement a full and very particular statement and history of the various incumbrances and mortgages which had been created and executed besides the issue of stock certificates. It names the Yarmouth extension, $204,000, to secure which, a mortgage was given to trustees. It then alleges that another mortgage was given to other trustees to secure certain cities and towns, (which had loaned money to the corporation,) of the railroad and franchise subject to the prior mortgage. This debt it is stated was $800,000. It next states that the corporation issued "first mortgage bonds" to the amount of $230,000, in the year 1851 payable in ten years and secured the same by a mortgage to the same individuals as trustees, subject to the mortgages before named. Then comes the allegation in reference to the mortgage now in question—"that afterwards in the year 1852 the said corporation duly issued, and sold in part, bonds known as the second mortgage bonds to the amount of $250,000, payable in 12 years with semi-annual interest, according to the tenor of coupons or interest warrants, thereto annexed, and secured the same by a mortgage of said railroad to said Patten, Hagars and McKean, who were trustees in the other mortgages, in trust subject however to the other mortgages hereinbefore named." The bill then asserts that "afterwards in the year 1857, the said trustees," the interest on said first and second *mortgage bonds not having been paid by said corporation*, "in behalf of such bondholders, and by reason of the breach of the condition of the mortgage, given to secure said bonds took the possession and management of said railroad, franchise and furniture and so continued the possession up to 1864." There is further on, a statement that the defendant corporation became possessed of said railroad, property and franchise by some title derived by, through or under the mortgages given to secure the first and second mortgage bonds, and a request for a disclosure of the title or claim set up.

The prayer of the bill is "to be let in to redeem the mortgage premises, on payment to the defendants of what shall appear to be due to them if anything, after deducting what the trustees, and the defendant corporation have or ought to have received from the profits and incomes of said mortgaged premises. The bill also prays for general relief.

The answers of the defendants, all admit the statement of mortgages and incumbrances as made by the plaintiffs. There is there-

fore no issue made by the bill answers or proofs, as to the legality or binding force of these several mortgages. The bill is one for redemption and that only, from a certain specified mortgage—not to cancel or restrict it or to set it aside. There are, doubtless, many things stated in the bill and elicited in the proofs which might be of importance, in adjusting accounts and equities, if the foreclosure is found to be ineffectual. But the preliminary and vital question is whether the mortgage has been foreclosed. The bill does not set up any original illegality or want of binding obligation in the mortgage.

But if these objections—which have been stated in the argument, were fully open, we should be hardly ready to say that they were so clearly established as to require or justify the decision—that the mortgage was void. By the direct vote of the stockholders, authorizing the issue of the second mortgage bonds, the president was authorized "to execute a mortgage of the road and appurtenances, subject to prior mortgages to secure said bonds."

This authority is in terms broad and ample. It seems to us no forced construction, which should hold that the evident design was to give power to mortgage the real and personal property of the corporation, belonging to, used with, and which was in fact, practically, the road and appurtenances. Even if the word "appurtenances" had been omitted and it had been simply a power to mortgage "the road," it would be too narrow a construction to limit the power to the road bed and rails. By the terms used, it is evident that the corporation had in view the same property and rights that it had before mortgaged by the deeds to which this is subject. The vote, which authorized the mortgage to secure the first mortgage bonds, was more specific and included, in terms "the franchise and furniture of the road." It would be difficult to limit, by any satisfactory definition of the words "the road and its appurtenances," the force and effect of them, short of a power over all that was the road itself and all that belonged to it as a railroad. Considering the object of the vote, the prior votes and mortgages referred to in this vote, and the evident intent to give full security on all the property, rights and interests, still remaining in the corporation, we see no reason to doubt, that power was given sufficient to cover the actual grant of the property including the franchise named in the deed.

But it is objected that the corporation had no power to mortgage its franchise, without the consent of the Legislature. The argument is, that the grant being to certain persons and their associates, the law will not sanction or permit the transfer to other persons or corporations.

It is, by no means, settled that this doctrine is recognized or admitted universally. It is doubted or denied in several cases in different States. The case of *Shepley vs. G. T. R. R.* 55 Me., (published since the arguments were made in this case), is substantially a denial by our court of this doctrine, and the reasons there given are cogent and satisfactory, and are based on common sense and practical views, rather than on theoretic speculations, which have little basis in fact or experience.

But is not denied that if the rule be, as first stated, subsequent ratification or recognition is equal to prior or direct assent by the Legislature. An examination of the various enactments in relation to the road and railroads generally leads to the conclusion that the State cannot and does not object. This objection, it is to be marked, is one resting solely on public policy, and the supposed interest of the State. It is one rather for the State than for the company to interpose.

Again—In this case the franchise—the right to be a corporation and to exact and secure tolls and fare, becomes of little practical importance to the present defendant corporation. If the foreclosure of the mortgage on the other property mortgaged, was perfect and sufficient, the statute authorized the body of bondholders to organize as a corporation and to, in effect, assume a new franchise and act under it. If then the franchise of the old corporation was not mortgaged, or if the conveyance of it in mortgage was illegal for want of legislative consent, and if, therefore, it has not passed out of the old corporation, yet, if all the other property has passed to the second bondholders, their new legalized corporation is sufficient for all practical purposes and exists by the express enactment of the Legislature. The complainants recognize the existence of the corporation thus formed, by instituting this bill against them and requiring them by the new name to answer, and to account and to receive what may be found due and to release the mortgaged property.

The plaintiffs having called in the bill for the disclosure of the defendant's title, and for the grounds on which they assume to hold

the railroad and its franchise and property—the answers place that claim on the ground of the foreclosure of the second bond mortgage and rest upon that. The answers and the evidence show that the foreclosure was made under the provisions of the statute of 1857, by publishing in the newspapers and recording as therein required. The question is whether that foreclosure was effectual.

It is objected in the first place that the statute does not, by its terms and scope apply to mortgages executed before its passage. We think that it is evident that it was the intention of the Legislature to provide a mode for the foreclosure of all existing as well as all subsequent railroad mortgages. The statute was passed to give what may be considered by those interested, or some of them, a simple and effectual mode of securing and enforcing the rights of both mortgagors and mortgagees in such deeds. The language is sufficiently explicit, "whenever any railroad corporation *shall have* mortgaged its franchise," &c. The object in view was to reach all this class of conveyances and the words used are sufficiently retrospective in their scope to include them.

But a more serious question is raised and pressed upon us with force and earnestness and requires full consideration.

It may be stated to be in substance this:—that if the statute is retrospective, so as to operate upon this mortgage it is unconstitutional and therefore void so far as this mortgage is in question. And it is unconstitutional because, if retrospective it violates the provision of Constitution of the U. S., which prohibits a State from passing any law impairing the obligation of contracts.

It is insisted that this mortgage having been given in the year 1852, must be governed by the law then existing—as to its redemption or foreclosure, and that the laws or rules then in force were so a part and parcel of the contract and so incorporated into it, that any change in the mode of foreclosure would impair the obligation within the prohibition. In following out this idea, it is contended, that in 1852, there was no mode by which a railroad mortgage like this could be foreclosed under any of the existing statutes of the State, or by any of the established rules of law, applicable to mortgages and their foreclosure. The only mode by which it could be effected, it is claimed in the argument, is by a bill in equity to foreclose, instituted under the general equity powers of an equity court, by which a sale or a strict and immediate foreclosure would be ordered.

It is important to ascertain what provisions of law then existed for the foreclosure of mortgages in Maine, when this contract was entered into.

The statute law had always recognized the existence of a right in the mortgagor of real estate to redeem the same after breach of the conditions, and had fixed that term at three years, after the commencement of proceedings to foreclose the equity. At the same time it had provided *by statute* the mode of proceeding on the part of the mortgagee to foreclose. These modes were specifically stated and exactly defined. One mode was by entry and possession for the purpose of foreclosing by the written consent of the mortgagor or his grantee. One by a peaceable entry, in presence of witnesses whose certificate of the fact must be recorded in the Registry of Deeds. Another mode was by a suit at law, declaring, in a real action, in the usual form, in which action either party, on motion and proof that the title claimed was in mortgage, might have a conditional judgment entered as on mortgage, in which it was decreed that if the debt was not paid in two months, an execution for possession should issue. If possession was taken under the judgment at law, the equity would be foreclosed in three years, after such execution of the writ of possession. Another mode of more recent date, but one existing for some years before 1852 and now on the statute book is by a publication in a newspaper without entry or suit, describing the mortgage, the breach of the condition, and intention thereby to foreclose the mortgage. The usual time of redemption, viz: three years, is allowed after the publication. We may say, in passing, that this mode of foreclosure by advertising is in all essential particulars the same as that provided for in the statute of 1857 for railroad mortgages with the same rights and time for redemption.

The foregoing were all the modes by which a mortgage of real estate could be foreclosed in Maine in 1852. It was decided in the case of *Ireland vs. Abbott*, 24 Me. 155, that since 1821, in Maine a mortgage of real estate cannot be foreclosed, except by pursuing one of the modes provided by the statute for that purpose.

The law in relation to mortgages of personal property in 1852, gave sixty days after breach for redemption. It was decided in several cases before 1852, that the title of the mortgagor became absolute as to the personal property mortgaged, at the expiration of 60 days without any action or proceeding to foreclose. *Thompson v. Moore*, 36 Me. 47; *Clapp v. Glidden*, 39 Me. 448.

More recently by subsequent statutes, the mortgagee in such cases must move to foreclose, but in 1852 the title to real estate, whatever that term includes, could be foreclosed in either of the modes pointed out, in 3 years, and the title to personal property by lapse of 60 days, after non-payment.

It is claimed that this railroad mortgage could not be foreclosed under any law existing in 1852. It would seem clear enough that whatever came under the name of real estate might be foreclosed under the statute relating to real estate, and whatever was personal estate would be foreclosed in 60 days, after the failure to pay any coupons. Now the foreclosure actually attempted in 1857, although following manifestly the then recent act of that year, was yet in substance a compliance with the provision of the statutes existing in 1852 viz:—the mode by advertising. It is admitted in the argument of the plaintiff's counsel that "a mortgage embracing real estate, and also personal estate, distinct from each other, might be foreclosed as to the reality as a farm and farming tools are on it." But he contends that the connection between the franchise and the covenant is different. He urges that the franchise and easements could not be foreclosed by the then existing law, and that therefore this mortgage could not be. He admits the real estate could be foreclosed under then existing statutes. Perhaps the remarks before made, touching the franchise might be applicable on this point, if all the real estate, including all that can properly come under that term, and all the personal property, including all that can come under that term, were legally foreclosed, under the statutes existing in 1852, by the published notice as to the one and by the expiration of 60 days, after non-payment, as to the other.

But if there were in fact, no existing provisions by statute or common law, by which in 1852, this mortgage could be foreclosed, a question would arise—how would the parties stand? Why should not the old common law doctrine apply, of a forfeiture of the entire property on a failure of strict compliance. But the plaintiff's counsel contends that there was another and existing mode of foreclosure in this State at that time, viz: by a bill in equity by the mortgagee to enforce a foreclosure. And he further contends, that this mode was so a part of the mortgage or contract, that a foreclosure by any other mode impaired the obligation of the contract, as before stated.

This leads us to an examination of the origin and nature of this

equity of redemption and the various modes by which a foreclosure or termination of this equitable right has been allowed to be effected, in England and in various States of the Union. The first reflection after such examination is that there is no fixed, uniform and universally acknowledged rule or mode, none that may be said to accompany every mortgage as a part of it and to be the sole and inflexible way to enforce its foreclosure.

It may aid us in the consideration of the precise question before us, which must not be lost sight of, to examine briefly the origin and the judicial history of the equity of redemption, or the right to a reconveyance or restoration of the property conveyed by payment or performance *after the day*.

There is nothing in the ordinary mortgage deed itself, which by any language gives or indicates any such right. The conveyance is first absolute. It is then qualified with the proviso, that if the note debt or claim specified is paid *when due*, the deed is to be void. In the deed in question the proviso is "if such railroad company shall well and promptly pay," &c. This is the contract at law, as a pledge. There is no intimation of any right to redeem beyond the day of payment.

At common law, as is well settled and perfectly understood, by non-payment, at the day, strictly according to the language of the deed the mortgaged estate becomes the absolute property of the mortgagee without action or process. The common law has never yielded this doctrine, except when the Legislature has changed it. It has left it to the courts of equity to create and to enforce equities. One of the most interesting portions of English judicial history is that which records the long, earnest, vigorous, if not violent struggles between the judges of the common law and equity courts on this matter. The sturdy and obstinate old common law judges stood firmly and unyieldingly by the contract as it read, and rejected all claims to qualify or extend it, or to create new equities or rights. But the courts of chancery at an early period held that until foreclosed by decree, the mortgagor, by applying within a reasonable time and offering to pay debt, interest and cost &c., might redeem the estate forfeited at law. This right to redeem, because it was created by and could only be enforced in the courts of equity, has been termed the mortgagor's "equity of redemption." On the other hand, the mortgagor might, after the estate had become forfeited at law, file a bill in chancery to foreclose the equity. Whereupon the

court, after account taken, will direct payment to be made within *six months* thereafter, or in default, that the mortgage shall be foreclosed. The chief clerk appoints a day for payment and upon default the mortgagee may obtain a final decree or order for foreclosure, which, when signed and enrolled, will foreclose the mortgage and fix the title absolutely in the mortgagee. *A sale would sometimes* be decreed in special cases, where in the judgment of the equity court it would be right and best for *all parties* But a sale, unless by statute requirement will not be ordered, as a right, vested and fixed, which a party may insist upon. A sale under the general equity jurisdiction, is by no means the certain or even the common mode of foreclosing the equity. It is true that the original jurisdiction of the court of equity which it assumed by main strength, has been extended and regulated in England by statutes recently. And the cases in which the court may direct a sale, instead of a foreclosure of the title have been enlarged and specified by English statutes of 15 and 16 Vict. But this rests on statutes not enacted and not in force here.

It is important to mark and remember the distinction between the powers and directions given by statute and those which have been the creation of the courts of equity.

An important question here arises as to the origin and history of this equity of redemption in this country and particularly in our own and our mother State Massachusetts.

It was and has ever been one of the boasts of New England that our fathers brought here and established by naturalization the "common law of England." It has ever been in force here in its strictness, and its wonderful flexibility and power of adaptation to new relations and new exigencies. It is, to-day, the law of the land, except as changed by statute, or obsolete as to certain portions, by time and the extinction of customs and interests.

But our fathers did not bring with them to Massachusetts, the court of equity, or the equity law, as expounded or created by that court. They did not bring the civil law, or any of its outgrowths, although like wise men founding an empire, they, from time to time, incorporated into their statute law, many principles of equity and many modifications of the stern strictness of the old common law.

There is no doubt, that from early times, the colonial laws recognized and yielded to the doctrine of a saving of strict forfeiture in mortgages by payment after the day, and provided a mode of secur-

ing that right by statute. At the same time they took care to provide a mode of foreclosure and a limitation of the time during which the right to redeem might be claimed. They saw that the moment you depart from the strictness of the common law, two things are to be regarded as essential and vital. First, if the right to redeem beyond the day is given to one party a right to enforce a forfeiture and foreclosure, within a reasonable time must be given to the other.

Otherwise the right might continue indefinitely. Now both these rights were created and existed by statute here and in Massachusetts, and always in this State. The equity of redemption here was not the creation or creature of an equity court struggling and disputing with the courts of common law, and in danger of strangulation if it came within the grasp of one of the black letter judges. Both rights here existed by positive law and legislative enactments. But the rights of both parties were well defined, both as to what mortgages came within the provision, and how the foreclosure might be enforced and how the equity of redemption might be made available. Mortgages of real estate alone were provided for. Or rather we should say, this right of equity and this right of foreclosure existed only in those cases where the statute gave or recognized them. There was no indefinite equity of redemption created by equity courts which could not be enforced by the existing modes, as pointed out in the statutes but could only be foreclosed by a bill in equity. It may here be remarked that until quite recently we have had no statute giving any right of redemption in pledges or mortgaged *personal* property by payment beyond the day. And we have never known of any claim that such an equity existed or could be maintained by any process in law or equity. The strict old common law applied to such mortgages or pledges of personal property here until the recent statutes. The fact is illustrative of the position that these rights are here the creation of positive law. Or in other words that the common law is the law of the land until some other power sufficient to do it, has changed or modified it.

The equity of redemption in real estate has always with us, been a well defined and determined right. It is the right to redeem by payment or performance in 3 years after entry or process to foreclose the estate. It is one sense a definite legal estate, for it has always been subject to conveyance by deed and to seizure and sale on execution against the mortgagor for his debts.

The process to enforce *this* right is given by statute, and is by a bill in equity. But *the foreclosure* on the part of the mortgagee has never been in this State by any process in equity. *Such a mode is entirely unknown in our practice.* There is no such authority given in the statute regulating mortgages. The statute is distinct in giving the remedy by bill in equity *for redemption.* But it gives in detail the modes by which a mortgagee, desirous of foreclosure may proceed to effect his object. We have before stated in detail all these modes by entry, by consent, by suit at law, by entry before witnesses and by advertisement in a newspaper.

We repeat, because it is in our view an important fact, that the mode of foreclosing a mortgage by a bill in equity has never been known in this State. No such case can be found, we are quite sure, on our records. If the right existed in 1852 it was a dormant right, never having been used or recognized, nor specified in the statute before named as one of the modes to be pursued. If existing anywhere it must have been a latent, dormant and undeveloped process inherent in this court as a court of equity, in the same manner as it was claimed in early days by the English court of chancery.

But this court never has been a court of unlimited general equity jurisdiction. It has never claimed or admitted the possession of such powers. Its equity powers are entirely the creation of the statutes, and have been by statute from time to time enlarged, but always precisely defined. It was decided in *Leighton v. Leighton*, 32 Me. 402, that this court has equity jurisdiction in those cases only in which it is conferred by statute. It was even held that where the statute gave expressly to the court equity jurisdiction "in all cases of waste," yet that this language did not give to the court all the powers possessed by courts having general equity jurisdiction in the matter of waste, but only to cases of waste at common law, where there was a privity of estate. It was admitted that the case of waste presented by that bill might justify a general chancery court, with full equitv jurisdiction, in granting an injunction. The same point was so decided in Mass. in 5 Met. 156.

The well settled doctrine as expressed in the cases cited below, is that the equity powers of this court are conferred by statute and are there enumerated, beyond which is forbidden ground.

T. & C. R. R. v. Myers, 41 Me. 109; *Hayford v. Dyer* 40 Me. 245: *Woodward v.* ——— 41 Me. 9; *Frost v. Butler*, 7 Me. 231; *Smith v. Ellis*, 29 Me. 442.

It has been held that whatever the rules in equity might be as to set-off they cannot prevail in this State when they are at variance with the provisions of our statutes relating to that subject. And so as to issuing injunctions. It is only when the power is given by statute that they can be issued. This was the condition of the law and the court in relation to mortgages in 1852 when this mortgage was executed. And we are now prepared to examine the precise question raised in this part of the case by the plaintiff. It is, as we understand it, nakedly just this. That the statute law of Maine as it existed in 1852 was not applicable to mortgages of railroads, that from the peculiar nature of these mortgages there could be no foreclosure of them except by bill in equity without special provision of statute therefor, and that no such statute could be applied to such existing or prior mortgage because it would violate the provision of the U. S. constitution before named, prohibiting a state from enacting any law impairing the obligation of contracts. It is urged, that this was in substance in the nature of a vested right, and so a part of the contract. That any other mode of foreclosure, although under a statute made for such cases, would violate the obligation of the contract.

It is strenuously pressed in various forms, that a foreclosure by sale under a decree would be more advantageous to the mortgagor than a foreclosure of the title, so as to secure it to the mortgagee, and that this was a right inhering in the contract and not part of the remedy. One answer to this view is to be found in what has before been shown, that a sale is by no means, even in the English practice, a fixed rule or established right in every case, nor is it a mode which either party can insist upon. The foreclosure may be strict, without sale, upon short notice and with not more than six months time to redeem. The length of the Chancellor's foot is not more uncertain, than the precise order he may make.

It is, however, urged that where the foreclosure is by bill, all these chances are open in a court of general equity jurisdiction.

But if we come back to strict law or right, the question at once arises, whether as matter of fact, there did or not exist in 1852 any statute or other law in Maine, not merely giving the right but compelling a party to foreclose *any* mortgage by a bill in equity? We have seen that no such law or rule was known or in use. Is not the argument on the other side stronger that as any equity of redemption can here only arise from or out of the law and is not

inherent in the common law contract, if there comes up a new case before unknown and unprovided for, which, by reason of its character and complication cannot be dealt with either as to its redemption beyond the day, or its foreclosure by existing laws, there is no equity of redemption, but the case and the contract and the deed must stand and be regulated as to the rights of both parties by its terms at common law.

If there is a legal equity of redemption in such a case, how is it created? Can this court with its limited chancery powers create a new species unknown to the statute or the common law? Can we make such an equity without a statute giving us the powers? And, on the other hand can we say that we have power to create a new mode of foreclosure beyond those so clearly and precisely given in, the statute, giving not merely a new form, but leaving the time terms and conditions of foreclosure to the discretion of a judge? Would not this be judicial legislation or the assumption of all the equity of the unlimited equity courts?

But if we assume that an equity of redemption could or might be thus created or recognized, it is apparent that it would be the creation of the law, by the court. At the same time, of course, the same law must create or recognize a right to foreclose and extinguished this equity. Now, if the law thus creates both, why may not the law through the law making power define, limit and provide a mode of enforcing this indefinite and latent power? How would such a statute remedy violate the obligation of the contract? Clearly not unless it affected some distinct right or obligation secured to a party to the contract and entering into and making a part of it at the time of its creation.

It is important to keep in view the exact proposition, by which it is attempted to demonstrate that the obligation of this contract is violated. It is not that the obligation at common law is affected, but that an outgrowth of that contract (which is the creation of the court, or at best of the law,) was one part of the original contract and incorporated into it, and that this right to redeem, thus created could not be foreclosed by any existing statute but only by a decree of sale by a court of equity, and that the Legislature had no power to provide any other mode.

The first, and sufficient answer to this proposition in this case is that, as we have seen, there never had been and was not at the time of the execution of this mortgage any such existing right to this

mode of foreclosure. It was unknown to our law and our practice. It has never to this day been known in our judicial tribunals. How then could it be regarded so a part of a contract, so fixed and so incorporated into it, so certain and unchangeable a right as against all other modes of foreclosure, that no judge, and no Legislature ture could adopt any other mode, without violating the constitution of the United States?

As a matter of fact then, we find no such existing law, rule or right that prescribes this single mode of foreclosure and therefore no basis for the essential proposition.

We are not without direct authority in our own court touching the equity powers of this court in reference to *foreclosure* of mortgages. It appears that in the revision of the statutes in 1841 an attempt was made to define the powers of the court, as a court of equity, in one section of the statute relating, not to mortgages but to the Supreme Judicial Court and its jurisdiction. Chapter 96 R. S. 1841. Among the cases named, as those which the court might hear and determine as a court of equity "when the parties have not a plain and adequate remedy at law" are the following:

"All suits for the redemption and foreclosure of mortgaged estates."

It was evident to every lawyer that the words "and foreclosure" were inserted by mistake, or if not that they were entirely inoperative, and could not and did not confer any power on the court to alter the existing law as to the mode of foreclosing. The parties had a plain and an adequate remedy at law, and no mortgage could be foreclosed except in the way the statute had pointed out.

The words in question had never been used before in any statute and at most could only be applied when there was not a plain and adequate remedy by existing law, or by using equity to enforce existing modes of foreclosure. The statute gives no new power and no new mode.

It is worthy of remark that although the provision remained in the statnte from 1841 to the new revision in 1857 yet no case can be found where it has been attempted, even distinctly to foreclose by bill in equity under it.

But the court was soon called upon to notice this interpolation, and to give a construction to it. In the case of *Shaw v. Gray* 23 Me. 178 (decided in 1843) the court say. "A court having general equity powers, might compel him to place himself in the condition

he would have been in if he had merely procured the mortgage to be discharged. * * * *But the powers of this court, as a court of equity are specific and limited by statute.* In regard to mortgages it is confined to suits for the redemption or foreclosure thereof. What is to be understood, in this instance, by *foreclosure*, it may be difficult to ascertain; for the Legislature have prescribed with precision what shall be done to foreclose a mortgage. *This court, it is believed are not vested with the power to decree a foreclosure in any case.* The acts which are to foreclose a mortgage, are *in every case*, to be those of the mortgagee or of those standing in the place of the mortgagee. It is not presumable that the Legislature intended to superadd a power in this court to adjudge or decree a foreclosure upon grounds other than what they have *specifically enacted to be such.* As to suits for *redemption* the power delegated must have reference to the mode of proceeding particularly prescribed for the purpose."

Again, in 1845, the court in *Chase v. Palmer* 25 Me. 345, say: "The proper proceeding against him would seem to be to obtain possession of, or to *foreclose* the mortgage. Yet we do not understand such to be the object of the bill. *And if it were*, though the court by the R. S. (1841), ch. 96, is in terms authorized to take cognizance, as a court of equity of suits "for the redemption and foreclosure of mortgaged estates," it is believed that the statute concerning mortgages (c. 125) actually precludes any action of this court, sitting in equity, on the subject of foreclosing mortgages; the provisions of that statute containing the rules which must govern in reference thereto; and none of them having reference to the action of a court of equity. The language of the statute, therefore, as to *foreclosing* mortgages in a court of equity, is inappropriate, and must have been introduced inadvertently without recurring to the specific provisions enacted for the purpose."

In the report on the new revision of the statutes in 1857 made to the Legislature by the late Chief Justice Shepley who was a member of the court when the decision before cited was made, and who has been familiar with the law and the practice of this State since its formation, we find this note referring to this language in the statute of 1841, giving his reasons for omitting them in the revision. He says: "The words "*and foreclosure*" are omitted as suited to mislead; the court having decided that it had no *jurisdiction to foreclose* a mortgage, 23 Me. 174, 25 Me. 341."

We find that the Legislature adopted the suggestion and omitted these words in the Revised Statutes of 1857. The clause there reads "For the redemption of estates mortgaged." The foreclosure in this case was commenced in 1859, after the statutes of 1857 went into operation.

It seems then, that the court of this State gave a construction to the language used in the statute of 1841, and decided that even when the words in question were in the statute, the court had no jurisdiction and no power to entertain a bill in equity to *foreclose any mortgage* for the reasons set forth in their opinions. No mortgage was thus foreclosed, whilst the words remained in the starute. The Legislature, under the suggestion before quoted, struck the words out in the revision. This was a clear affirmative act, by which the Legislature delared that no power should rest in the court to foreclose a mortgage by bill in equity. It was not a mere omission to provide that mode, but under the circumstances equal to a clear declaration that no such power existed or should be exercised.

The former statute, it was declared by the court, so far as these words are concerned, whilst existing, gave no power to foreclose in equity. The Legislature affirmed the same doctrine and omitted the words as useless and tending to mislead. So that, there never was a time when the court had the power claimed. And even if there had been such power from 1841 to 1857, it was taken away by the omission in the new statute, which was in force when this foreclosure was attempted. The mortgagees were not bound to institute proceeding for foreclosure, until they saw fit, under a claim from the bondholders. It is for the mortgagee to determine when he will foreclose.

Even if the language in the law of '41 had any practical force, yet surely the Legislature might take away that power or mode of foreclosure, if they left the essential rights of the parties as they were prescribed and fixed by law as to foreclosure intact and unchanged. For those words gave no new rights to either party or to the court to create any, or to decree any new mode of foreclosure as decided by the court in the above cases.

The Legislature has power to alter remedies at pleasure. It could hardly be contended that this naked expression in the law of '41 even if it had any force, so entered into and became part of the contract, as elsewhere explained, that mortgages executed between '41 and '57 must be foreclosed by a bill in equity, even after its repeal and in no other mode, and that the Legislature had no power

to alter or repeal the clause, because by so doing they would impair the obligation of the contract.

It will be observed that the words in question, do not create or imply any new mode of foreclosure. Had not a mortgagee, during this time, a right to foreclose by any of the modes pointed out in the statute then existing, by entry or suit or advertising? Clearly the provision, if operative did not take away the right to use existing modes of foreclosure. If it did, then all the attempted foreclosures during these sixteen years, are void. A result, to say the least, alarming in view of its effects in unsettling titles. But it did not.

The case does not therefore raise the question how far the Legislature, may alter or limit or extend, a certain fixed and established mode or remedy, nor whether a given case comes under the definition of a remedy, or is one where a substantial right is violated or taken away. It is common learning, that the Legislature may change at will, remedies, but cannot impair rights or obligations. It might probably be seriously questioned whether the Legislature could constitutionally abridge the time of redemption existing by statute at the time the mortgage was given—say from three years to one year. This would be taking away a fixed right, one that existed when the contract was made, given by the statute law of the State. It would take away two years time and give nothing in lieu or exchange. But it could hardly be questioned that the Legislature might vary or add or diminish the different modes of foreclosure as to existing mortgages, provided no essential right that before existed was impaired. If the essential things, viz: on one side, three years right to redeem, and on the other a mode of foreclosure by which reasonable notice must be given to the mortgagor, are preserved, it matters but little what *forms* are adopted to enforce these rights. If a new case, not covered by existing statutes, arises, it would seem to be plainly the right and duty of the Legislature to provide a mode by which the rights of both parties might be secured, following, if it saw fit, existing laws and forms and modes of proceeding as far as applicable, either to foreclose or to redeem. There could seem to be no objection to this unless it is plainly shown that some fixed, vested or inherent right, existing at the time of the contract, is violated, as before stated.

Now in this case the mode adopted by the statute was in substance and effect identical with one of the modes existing in 1852 viz: by advertising in a newspaper a certain number of times.

The new statute gives the same time for redemption as the previous one, three full years. There is no objection made that the time or notice was not sufficient, or that any right in these particulars had been infringed. The sole objection is that the *mode* of foreclosure was an infringement of an existing fixed and unalterable right, to have a decree of absolute sale of the property within 60 days or some very short time. It might deserve consideration whether the granting of three years time for redemption, if it were in *lieu* of a peremptory sale, would impair or diminish the right. But it is unnecessary to discuss this point. If it were essential we might be unable to find the fact established that the complainant's essential rights were actually abridged, diminished or injuriously affected by a three years right of redemption before foreclosure instead of a peremptory and immediate sale at auction. By our law real estate is levied upon by an appraisement of three disinterested men and the title is thus conveyed to the creditor, subject to a right of redemption in one year after the levy by paying the appraised value and interest. In many other States such execution is levied by a sale of the premises by the sheriff without any right of redemption. By our law, also, a lien can be created on real estate, by an attachment of it on mesne process, which holds good until a levy on the execution, if made within thirty days after judgment. Now, if in a State where the levy is made by sale, and such lien by attachment is recognized, the Legislature, after such attachment and before judgment should change the mode by adopting our law, by which all subsequent levies should be by the appraisement of three disinterested men, the debtor having a right to redeem in a year, could the *debtor* object that his rights had been injuriously affected and the Constitution of the United States infringed?

No one pretends that a mere change of form in the proceedings, or the substitution of one form of remedy for another, by which the same substantial result is reached can work such a result. It must appear distinctly that some fixed and absolute right or condition of the contract is impaired *injuriously* to the party complaining. That fact must be found and clearly established before any question of this nature can arise.

Our attention has been particularly called to the case of *Bronson v. Kinzie*, 1 Howard 311, and it is cited as sustaining the argument on the part of the complainants. On a careful examination, we do not find anything in the decision of that case, that militates with the views before expressed in this opinion.

The facts in that case were in brief these: A mortgage given in Illinois to secure payment of money on a day certain, containing a stipulation that if default be made in payment of principal or interest, the mortgagee might enter upon and sell the mortgaged premises at auction and retain the amount due to him and rendering the surplus if any to the mortgagor.

After this mortgage was executed and before this bill to foreclose was filed, the Legislature of Illinois passed a statute which in terms applied to this mortgage, by which in substance a new equity of redemption in the mortgagor was created by giving him a right to redeem after a sale under a decree of a court of chancery for foreclosure by paying the purchase money and interest in 12 months after the sale, and further if the *debtor* did not pay within that time, *any* judgment creditor might, on like terms within 15 months, pay and thus redeem for his own benefit. Another statute at the same session, also enacted that in all sales for foreclosure under a decree in chancery, the property should first be appraised by disinterested men and if two thirds of the appraisal was not bid, it should not be struck off.

The question before the court arose under a bill for foreclosure; the complainant claiming that he had a right to have a decree of foreclosure and sale, under the law of Illinois, as it existed before the new statutes were passed.

The court based the decision of a majority in favor of the complainant, on the ground that the obligation of the contract "depended upon the laws of Illinois, at the time the deed was executed and that at that time by that law a mortgagor had an absolute and *undoubted right* under an ordinary mortgage deed, if the money is not paid to go into the court of chancery and obtain its order for the sale of the whole mortgaged property (if the whole is necessary) free and discharged from the equitable interest of the mortgagors." The court say "This is his *right* by the law of the contract and it is the *duty* of the court to maintain and enforce it." This "*right*," as before shown, does not by the law of Maine, exist in the mortgagor and never has and therefore this decision rests upon a vital fact, not found in the case before us. It is admitted in the argument in this case, that there was no statute law authorizing a foreclosure by the bill in equity providing in its terms a mode of proceedure, nor is it asserted that any such course was ever known in our practice. The argument is that such a course of proceeding was according to

general equity practice in courts of general equity jurisdiction and might therefore have been resorted to in this case, and that, in fact, it was the only mode by which the mortgage could be foreclosed. We have fully considered this proposition.

The court in the case under consideration, after stating the common law doctrine of absolute forfeiture of the estate at the day, by non-payment, and the equity view of resulting trust after the debt is paid, say that "courts of equity lend their aid, either to the mortgagor or mortgagee in order to enforce their respective rights. The court will upon the application of the mortgagor direct a reconveyance to him upon payment of the money." We have in Maine by our *statute* authorized this form of proceeding on the part of the mortgagor to redeem. The court then goes on to say, "And upon application of the mortgagee it will order a sale of the property to discharge the debt. But as courts of equity follow the law, they acknowledge the legal title of the mortgagee and never deprive him of his right at law until his debt is paid, and he is *entitled* to the *aid* of the court to extinguish the equitable title of the mortgagor in order that he may obtain the benefit of his security." Then follows the language first quoted, as to his "absolute and undoubted *right*" to such a mode of foreclosure. The court then says, "when this contract was made, no statute had been passed by the State changing the rules of law or equity in relation to a contract of this kind. It must therefore be governed and the rights of the parties under it, measured by the rules above stated. *They were the laws of Illinois at the time.*"

The opinion holds that by those laws then existing, the mortgagee, in an ordinary mortgage, independent of the special right of sale stipulated in that deed, had a fixed, certain and definite right to a foreclosure under a bill in equity instituted by him, and to a decree of the court of equity for an absolute and immediate sale of the premises, by which his debt might be paid. That this law was incorporated into the contract and became a part of it. By the existing laws and practice of Illinois mortgages are foreclosed by bill in equity.

The statute of Illinois did not attempt to change any *form* or take away the right to obtain a decree for a sale but undertook in the first place, to create a *new equity of redemption after such sale*, first for one year to the debtor, and he failing to redeem, for fifteen months to *any* judgment creditors of the debtor. And, not content with this, by a subsequent act, abrogated the right to sell under

such decree, unless two thirds of a value fixed by appraisers, should be offered at the auction sale. The court did not regard these new provisions as a mere change of remedy, a mere alteration of the form of reaching the same result, but as creating new and distinct rights and conditions in and under the contract *injurious* and unjust to the mortgagee, by giving a new estate which before had no existence to the debtor and in a contingency to any judgment creditor. "If" say the court "such rights may be added to the original contract by subsequent legislation, it would be difficult to say at what point they must stop. The statute gives to the mortgagor and to the judgment creditor an equitable estate in the premises which neither of them would have been entitled to under the original contract, and these new interests are directly and materially in conflict with those which the mortgagee acquired when the mortgage was made. Such modifications of a contract by subsequent legislation, against the consent of one of the parties, unquestionably impairs its obligation and is forbidden by the constitution."

The court also animadverts on the other provision as to the new condition annexed to the sale and shows how it might operate to prevent any sale or greatly delay the remedy of the creditors.

The court is careful to distinguish between a remedy and a right. It says: "Although a new remedy may be deemed less convenient than the old one and may, in some degree, render the recovery of debts more tardy and difficult, yet it will not follow that the law is unconstitutional. Whatever belongs merely to the remedy may be altered according to the will of the State, provided the alteration does not impair the obligation of the contract. *But if that effect* is produced it is immaterial whether it is done by acting on the remedy or directly on the contract itself."

This case, we may remark, would more nearly resemble the one before us, if the *debtor* in Illinois had complained against the creditor when he, abandoning his original right to foreclose absolutely by sale, had proceeded under the new statutes, yielding the new right of redemption to the debtor and causing an appraisement to be made. The court could hardly find grounds for sustaining such complaints where it was manifest that no proceedings injurious to the debtor were shown or could be established.

The real question before us is, whether the debtors or the mortgagors have a right to insist upon a particular mode of foreclosure of

his mortgage, when the mode adopted and sanctioned by the Legislature is perfectly satisfactory to the mortgagee and has been adopted by him. What obligation of the contract is violated, under proceedings which secure the right to redeem amply and to the full extent known under any law of the State? How is he injuriously affected?

But even if we had before us the *mortgagee*, complaining of the statute mode of foreclosure and claiming a decree for a peremptory sale, our answer must be, "we can find no law or practice in this State which gives you a right thus to foreclose. None such exsited when you took the mortgage and therefore no such right could make a part of your contract, as it did in the case cited under the laws of Illinois." The distinction between the cases is obvious and clearly marked in several particulars, but chiefly and fundametally in the existence in one case and the non-existence in the other of this fixed right. Our view of the effect of the mode of foreclosure, adopted in this case, has been fully stated. It is in substance that it neither gives any new right nor takes away from either party any vested or conceded or established right existing or in force when the contract was entered into and violates no provision of the Constitution of the U. S.

The result upon this part of the case is that in form and substance the foreclosure was sufficient to extinguish the right of redemption as claimed by respondents, unless rendered inoperative from other causes and for other reasons hereafter to be considered.

But the complainants urge that the redemption should be open to them, even if the proceedings should be found to have been regular in form and such as would bar them in the absence of other facts. They insist that the trustees were guilty of such laches, bad management, and illegal if not fraudulent combinations with other parties to secure a foreclosure, when it might and should have been prevented by them, that the whole proceedings, however formal, should be set aside as in fact a fraud upon the plaintiff corporation, subjecting them to a foreclosure, when it was the duty and within the power of the trustees to have prevented it.

In considering this branch of the case it becomes important to ascertain the exact condition of the trustees, and their relation to the several parties in interest. They were appointed by the stockholders of the plaintiff corporation at the time the vote was passed, authorizing the issue of the second mortgage bonds, and before any of the bonds had been sold, and of course before there were any

second bondholders in existence. The deed to the trustees was executed within ten days after the vote.

At this time, the corporation was in possession and running and managing the road. The trustees were then mere mortgagees, out of possession, with no other rights or duties than such as related to holding and enforcing the mortgage. This deed was delivered in Oct. 1852, and the bonds thus secured were sold to different holders. The coupons were paid until 1856, but after the first of April of that year, payment ceased of the coupons of this class and also of the first mortgage bonds, to secure which a prior and similar mortgage had been made to the same individuals as trustees.

After this failure to pay the coupons due, the directors of the corporation by vote, authorized "the president to enter into an arrangement with the trustees of the holders of the bonds, whereby they may take possession of the road" upon certain conditions or understanding. In this vote the directors admit the non-payment and give their consent that trustees might enter and take possession of the road, under their mortgage deed and hold the same until the interest due upon those bonds should be paid. The vote then specifically points out how the proceeds are to be applied and the order and priority of payment. The last of all being the "coupons on the bonds of 1852"—(the second mortgage bonds.)

It does not distinctly appear that any subsequent, formal agreement was made by the president and trustees. But this vote of the directors who spoke and acted for the corporation clearly indicates a conviction that the corporation was unable to meet its immediate liabilities and was willing that the trustees should take possession and apply the proceeds according to the order set down.

The counsel for the plaintiff corporation in his argument assumes and claims that the possession taken by the trustees in Sept. 1857 was taken under this vote and was continued under its terms and conditions. The paper appears among the exhibits of the defendants. It is not signed by the trustees or president, but shows only votes of directors. The answer of the surviving trustee (Mr. J. Patten) states that this entry, under the second mortgage, was made in accordance with the directions duly given by the second bondholders at a meeting duly called, organized and held for that purpose. The R. S. of 1857 ch. 51 authorized such proceedings. We do not find among the exhibits any copy of such vote of the bondholders.

But if the entry and taking possession was in either mode, it is clear it was not taken for the purpose of *foreclosing* the mortgage. It was a possession for the purpose of taking the income, earnings and receipts of the road, to be applied, if the entry was made under the vote of the directors, according to its terms, if under the vote and direction of the bondholders, according to the provisions of the statute.

The trustees were thus in possession. They evidently had duties to perform toward two parties. One, the corporation that designated them and whose property and railroad they had taken, the other, the bondholders for whom they held the property in trust and in mortgage. It was substantially the case of a mortgagee in possession before breach of the condition, or before entry for the purpose of foreclosure.

As such trustees it was their duty to manage the property with reasonable care, prudence and faithfulness, to apply the nett income according to the legal rights of all parties. But it is evident that under *that* entry and possession the mortgage in question was not and could not be foreclosed so as to divest the equity of the corporation. The trustees, thus holding, might be liable to the parties in interest for any neglect, fraud or misconduct, but *such* possession however long continued would not extinguish the equity.

But in May 1869, a number of the holders of the second mortgage bonds, applied to the same trustees then in possession as before described, to *foreclose* the second mortgage on the ground that the interest coupons thereon had not been paid since April 1856.

In compliance with this request the trustees proceeded to advertise for a foreclosure in pursuance of the statute of 1857. According to that statute, which in this respect resembles the general statute of 1841, this notice would be effectual to foreclose although no possession was taken under it. This mode, indeed, gives no right of possession, nor in itself does it affect any existing possession. The trustees remained, as before, in possession under their first entry. The notice for foreclosure, however, was a fact which was of great importance and of vital interest to both the parties for whom they were trustees.

A mortgagee in possession is undoubtedly in an important sense a trustee for the mortgagor and bound to regard his interests. These trustees knew that in three years the equity would be foreclosed and it was their duty to prevent this consequence if they could legally, and had the means or money in their hands which

they could properly and consistently with their obligations to others and with their duty under the law or stipulations under which they acted, apply to the payment of those second mortgage coupons, due and unpaid. And we think, further, that if, having such means, they diverted them to other illegitimate objects, or entered into combinations with others to allow the time of redemption to run out, when it could have been prevented by the use of earnings or assets in their hands which might under their responsibilities and duties have been so applied, that the foreclosure should not be set up or be held effectual.

Again—if, by intentional mismanagement or neglect, or by such gross and clearly proved misfeasance in their office and inattention to the wants and interests of the road as would amount to constructive fraud, the income was thereby reduced so as to affect the nett profits, which a different mode of administration would have produced, which profits would have been or might have been, with other means in their hands properly applied to the payment of these coupons before the three years would have expired and would have been sufficient, that the same result as to the strict foreclosure would follow. It would be against right, reason and fair dealing to hold otherwise.

This brings us to the consideration of the charges in the bill on these points. We must keep in mind the fact that the two parties are the corporation and the body of second bondholders, and that it is the acts and proceedings and conduct of the *trustees* that are in question. The questions raised touch them only in the result although any connection or combination with others, if proved, may be important and may properly be considered if they bear upon that point.

The obligation was on the corporation to pay its debts, but as the source from which the money to pay them was expected to be derived was given into the hands of the trustees, it is but reasonable to require in behalf of the original corporation, that the road should be managed and the income applied, so that, if possible within the prescribed duties and obligations, a foreclosure might be prevented. At the same time the trustees are not to be held to do impossibilities, or what they had not legitimate means to do. They were not in possession, it must be remembered, with unlimited and unrestricted powers to do what they pleased with the income of the road. The law (R. S. ch. 51) plainly points out their duty and

limits and specifies the order of appropriation of the income they may receive. This statute should be read in this connection.

The vote of the directors, as before shown, clearly and distinctly required a specific and progressive order of payments or appropriation to separate classes of claims, under seven heads, each being postponed to the preceeding.

This brings us to a consideration and examination of the precise allegations in the bill which are the only grounds which we can properly consider.

It is nowhere directly asserted in the bill that the trustees, at the time when the foreclosure as claimed became perfected, or at any other time, had *actually* money in their hands, which they might legally and should have applied to the payment of the coupons due on these bonds. But it is alleged "that the said trustees so carelessly, negligently and unskillfully managed said railroad and its affairs while in the possession thereof, that the nett earnings and income received by them were much less, to wit:—in the sum of two hundred thousand dollars *per annum*, than they should have been and would have been, if the same had been faithfully and properly managed by said trustees and in accordance with the spirit and fair intent of said trusts."

There is another allegation in substance the same. It is that from the time when the trustees became possessed of the railroad, it has been of great value and sufficient, if administered according to the true tenor and effect of the trust and of the equitable liens with which the same was changed by the corporation, to have paid the interest upon the bonds and should have been so applied. There is also an allegation, that a *majority of the directors*, combining with the trustees for the purpose of becoming the owners of the railroad, neglected to pay the interest upon and redeem the bonds.

There is no allegation in the bill of willful, intentional, corrupt or designed mismanagement or neglect. The charge is of negligence and unskillfulness. The trustees were JOHN PATTEN, JOSEPH MCKEAN and M. S. HAGAR. They were designated by the plaintiff corporation for the trusts imposed by the deed, and for all the duties which might thereafter devolve upon them as such trustees.

The corporation knew them and reposed great trust and confidence in them. It is apparent from the evidence that it was well known to all that they were not men having experience in the direct management of an operating railroad. It would hardly be reason-

able to hold them responsible under the circumstances, for the highest skill or for failure in managing the road up to the highest point of success which it is possible might have been reached by experienced, long-tried and exceptional managers.

The charge is general. No specification of any particular instances or detail of any definite failure or mismanagement are set forth in the bill.

The answer of the surviving trustee (Mr. Patten) distinctly denies the charge of mismanagement and asserts the contrary. He avers that they did their best, and employed as superintendent a man of good repntation for skill, integrity and experience, and gave their personal attention so far as required.

Is this denial overcome by the proof? In judging of the success and management of the road, it is fair to regard the condition in which it was, financially and *structurally* when the trustees received it. Its financial condition is referred to and may be gathered in the vote of the directors in 1856 before referred to. It is there stated as a reason for consenting to surrender the road to the trustees, that the coupons had not been paid, and that the directors had not the means at present to take up these coupons.

Comparing the receipts and expenditure after the trustees took possession with those of the immediately preceding years, we do not find the comparison unfavorable to the trustees. It is shown that the credit of the road was at a low ebb, and that the trustees used their private credit at times to keep it in operation. It does not appear that the corporation or its officers or the stockholders at any time before the foreclosure preferred complaints in any formal manner, if at all as to the mismanagement of the road.

The testimony on this point introduced by the plaintiffs is rather of general impressions, beliefs and su-picions that matters were not managed as well as they might be, than of any definite and distinct facts. It would be difficult for any master or auditor to state or fix upon any specific instance of neglect or want of skill, for which a sum of money should be charged to the trustees. It may be granted that the road, owing to various causes, was not yielding what might have been secured by a first class road in a first-rate condition in all respects. There may have been and probably were mistakes and errors and miscalculations and disappointments to those who desired to use the road for transportation. It would be tedious and useless to go over all the evidence bearing on this point. On a careful and

candid examination of it all, we have no hesitation in coming to the conclusion that the evidence fails to overcome the answers on this point or to establish the charge within the rule before stated.

The next charge in the bill is, in subtance, that the three trustees McKean, Patten and Hagar, "while acting as trustees and being in possession, combining with a majority of the directors named and with R. D. Rice, John B. Brown, George F. Shepley and H. N. Jose and others, contriving and intending to obtain for themselves and their associates the possession, management and ownership of the railroad, franchise and rolling stock and to deprive the plaintiff corporation of the same, for that purpose bought in a large amount of different kinds of stock, bonds, coupons and mortgages and other claims, which the plaintiff corporation was bound to pay and redeem amounting to about seven hundred thousand dollars, and the plaintiffs allege that they are informed and believe that these purchases were made with the money belonging to the corporation, being the earnings of the railroad, and that all this was done by the said trustees, directors and other persons in connection and combination and for the purpose and with intent as before set forth.

To this charge Mr. Patten answers that it is not true, that he never had part in or knew of any such combination or purchase, that the other trustees so far as he knows or believes never combined or purchased as charged—that he has no knowledge or belief that any such purchase was made by the other trustees or other persons named in the bill. Mr. McKean and Mr. Hagar both deceased before the bill was filed, or before any answer was made. Mrs. Hagar as administratrix of her husband—in her answer, adopts the answer and denial of Mr. Patten. All the other parties to the bill, in their answers, deny any such combination or purpose or any connection of the trustees as such with any purchases.

We cannot find evidence in the case to overcome the denials. The testimony of defendants sustains the denial in the answers of any such fraudulent or unfaithful and dishonest combination, purpose and acts on the part of the trustees. The testimony on the part the plaintiffs fails to sustain it. The accounts as presented, do not show any appropriation of the earnings of the road for such purpose. We speak now of the general charge of combination between the directors, trustees and other persons to purchase the stock, bonds, coupons, &c., of the road and the actual application of the funds of the corporation for the purpose of obtaining possession of

the road and its entire franchise and property. The next charge, however, is more specific, and relates to what is called the Williams purchase as is evidently more relied upon than the general charge above stated.

The charge in the bill, is, in substance, that Reuel Williams, deceased, was the owner in his life time of original, preferred and Yarmouth stock bonds, coupons, and claims secured by a mortgage of the rolling stock to the amount of five hundred thousand dollars or thereabouts, and that in the year 1861 he offered to sell and dispose of the same to the trustees, for the benefit of the plaintiffs, for $113,000 or about that sum, being much less than the real value, but the trustees contriving and intending to obtain for themselves and their associates the ownership of the road declined to accept the offer and make that purchase, which, in the proper exercise of their trusts, they should have made.

This charge is also very distinctly and positively denied in the answers and we find no testimony which establishes the facts charged against these denials, and the testimony of those who were concerned in the actual sale and transfer of these securities by Mr. Williams.

But the bill proceeds to make another charge against the trustees in relation to this Williams purchase, and avers that after declining to purchase for the corporation as before stated, Rice and Alden purchased them of Williams for the benefit of the trustees and their associates and for the purposes before set forth, for the same sum ($113,000) which was paid to Williams out of the earnings, income and profits of the road, and that instead of surrendering the said purchased securities and obligations to the original corporation, as in justice they should, they claim to hold the same against and to recover the same in full of them.

Then follows the several allegations before referred to, that the trustees, directors and the other persons before named combined together for the purpose of becoming owners of the road and to effect that object, in violation of their trusts, neglected to pay the interest upon and redeem the bonds.

This matter of the Williams purchase forms a prominent part of the evidence and arguments in the case. The answers deny the charge of any connection of the trustees in their capacity in the original purcha-e from Mr. Williams.

On a careful examination and consideration of the evidence on

this point, we cannot find sufficient evidence to sustain the allegation as made, viz: that the purchase by Rice and Alden of Williams was made for the benefit of the trustees alone or with associates in pursuance of a combination or agreement or understanding between the persons and parties named, to obtain possession and the property in the railroad for themselves, in fraud or wrong against the corporation and that the earnings of the road were used for that fraudulent purpose. There is evidence which tends strongly to prove that one of the trustees (Mr. Hagar) had had conversation with Rice, concerning his proposed purchase, and that he was willing and desirous of being one of the company to purchase if the terms were satisfactory. He died before the final contract with the trustees, but his administratrix was allowed to come in as one of the company (Rice and others), who sold to the trustees. But there is no sufficient evidence that in whatever he did or commenced in relation to or in connection with the purchase by Rice of Williams, he was acting in his capacity of trustee or using or promising to use the earnings of the road to carry out any illegal purpose. He seems to have acted as a private individual, on his individual responsibility in this matter. And he was but one of three persons on the board and could not, if he would thus divert the earnings without the consent of his associates, acting as a board.

The facts do not show, to our apprehension, the combination and purpose as charged against the trustees. They do show that there was a proposal and plan started, to obtain by purchase of Mr. Williams his securities and claims, and that this plan and purpose was understood by several persons, and that there was a more or less distinct and binding agreement or understanding between Rice and other persons as to participation in the trade, and that these persons were some of them directors and some owners by purchase and otherwise of the bonds of the company. There is a considerable indefiniteness and want of clearness in some parts of the testimony as to this purchase, so far as others than the trustees were concerned.

But we must remember that the second bondholders, whose mortgage is, if foreclosed, the entire basis of the defence, were not responsible for the acts, intentions or combinations of the directors or stockholders of the plaintiff corporation or of the holders of other bonds. The trustees named in the deed, were their trustees and it is *their* acts or neglects alone that the second mortgage bondholders can be held answerable for.

Now, how stood matters, from the time of possession by the trustees, up to the time of foreclosure in May 1862? The trustees had assumed a second possession anew for the *first* bondholders in Sept. 1860, about one year and a quarter after the possession taken under the second mortgage in question. But it is to be marked, that in neither case, did they enter for the purpose of foreclosure, nor have they ever claimed a foreclosure by virtue of an entry and continued possession. The foreclosure, if legally made, was made solely by virtue of the published notice and the expiration of three years from its date and so far as the *foreclosure* is in question, the possession is immaterial. There are allegations that the first bondholders commenced proceedings to foreclose, but we find no evidence of such attempt among the exhibits. The whole question rests upon the proposition that the mortgage of second bondholders was legally foreclosed. If not the defence fails confessedly.

Although the evidence does not satisfy us that there was any unfaithful combination on the part of the trustees, with others to use the funds of the company to purchase the securities of Mr. Williams as before stated, yet it is admitted and clearly proved that the trustees did afterwards negotiate with Rice, the purchaser, for the sale and surrender to them of a portion of the bonds, &c., obtained from Mr. Williams and agreed to pay therefor the sum of $110,000. The contract as finally consummated was dated Feb. 17, 1862, and the trustees, McKean and Patten agree to pay the above sum in semi-annual payments of $10,000 each, with interest, the first payment to be made on the 20th of March, 1862. These payments were to be made out of the nett earnings of the road after paying certain special claims, being those which had priority over the first and second bonds. This contract was entered into in pursuance of the vote of the first and second bondholders who had been separately organized into corporate bodies, under the statute of 1857. This contract, it will be observed was signed about three months before the foreclosure of the second mortgage under the advertisement.

It appears from the accounts as stated that in the year 1862 $28,300 was paid on this purchase and the balance was paid in full in the year 1863.

The question is now reduced to this, whether the trustees under the direction of the bondholders, *diverted* money and means in their possession and control which ought to have been applied to the pay-

ment of the over due coupons of the second mortgage bonds by which the foreclosure might have been prevented. If they did, we do not see any reason why the foreclosure should no be disregarded and the plaintiffs let in to redeem. It was their duty to prevent a foreclosure if they had means sufficient, which without violation of prior rights, or the law or the obligations imposed and resting upon them, they could thus use.

They say they had no such means. As before stated the bill does not directly assert that they had. It does charge that the *directors* combining with the trustees and others for the purpose of becoming the owners of the road, neglected to pay the interest upon and to redeem the bonds. But the *directors* were the officers and agents of the plaintiff corporation, the *bondholders* were not responsible for or liable to account for the neglects or misdeeds of such directors.

The bill in its whole structure seems to be based upon the alleged unfaithful, if not corrupt combination and plan between the directors, trustees and others to defeat a redemption. We have before considered these charges in detail. Nevertheless we should have little hesitation in holding even in the absence of proof of the combination or conspiracy, that, if the trustees had funds in their hands which they might legally and properly (as before explained) have paid to redeem these coupons of the second mortgage bonds, their neglect or omission to do so would have saved the foreclosure.

The three years for redemption expired about May 18, 1862. In order to save the foreclosure, the whole amount due on these coupons must have been paid. The payment of even a large amount if not sufficient to pay the "uttermost farthing" would have been of no avail. Now the trustees say that they could not do this, for two reasons. The first that they had at no time, after they took possession, nett earnings sufficient to meet these demands. That the arrears of coupons on these bonds in May 1862 was between seventy and one hundred thousand dollars.

And they say secondly that whatever surplus means they had, they were bound to apply to demands of a prior date, having by the statute and by law precedence. They say that if they had paid these coupons they would have been liable to other parties and to the charge of mismanagement in their office. They say that the question here must be determined by the state of facts existing prior to May 18, 1862 and that subsequent events, or subsequents success or subsequent application of the money or assets of the new company,

or of the bondholders after foreclosure cannot change or vary the legal rights of the parties.

If the trustees had not funds which they could and should have used for this redemption, the plaintiff and complaining corporation knew that the foreclosure had been commenced—that in three years it would be complete if the whole of this debt against them was not paid, that the corporation and not the trustees were the debtors—that if the trustees had no such funds at the day, the forfeiture of the estate was inevitable, and yet it does not appear that any effort or any offer of aid was made by the corporation or individual stockholders, but the time was allowed to elapse with all the resulting consequences of a new corporation, &c., provided in the statute. These facts and considerations might not be sufficient to estop the complainants, if the charges made had been sustained, but they cannot escape notice as belonging to the history of the case and the consideration of the proceedings of the trustees.

After a careful consideration of this part and the evidence to sustain these grounds of the case, we can find no sufficient reason for declaring the foreclosure ineffectual.

There would seem to be no legal objection arising from the subsequent acts of the trustees, or of the new corporation, if the trustees were not guilty of want of due diligence in not redeeming before the expiration of the three years, as before explained. The only legitimate use that could be made of these subsequent facts, either in relation to the income of the road, or of the use of the funds, would be to connect them as far as they bore upon the previous proceedings. But taking the whole evidence together and keeping in mind the exact point to be established our conclusion is that the bill must be dismissed.

"The Bill Dismissed."

Appleton, C. J., Cutting, Walton and Danforth, J. J., concurred.

Barrows and Tapley, J. J., do not concur.

Copy,

WM. WIRT VIRGIN,

Reporter.

ERRATA.

Page 2, line 20, for "Hagars," read "Hagar."
Page 7, line 11, for "1857," read "1859."
Page 7, line 12, for "that year," read "1857."
Page 16, line 11, for "Starute," read "Statute."
Page 24, line 22, for "1869," read "1859."